Mohd Haikal bin Mohd Khatib Saddaly & Ors v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO N-05–(63–67) OF 2004
ABDUL MALIK ISHAK, LOW HOP BING AND KN SEGARA JJCA
24 APRIL 2009

Criminal Law — Common object — Penal Code s 149 — Criminal act done by several persons, in furtherance of common intention — Whether required proof of a pre-arranged plan — Difference between 'common object' and 'common intention' — Whether all members of unlawful assembly must be present at all times in order to qualify usage of s 149

Criminal Law — Murder — Penal Code s 302 — Juvenile offenders — Appeal against conviction and sentence — Whether prima facie case made out — Defence — Whether amounted to a mere denial — Whether trial judge erred in law — Whether appellants rightly convicted and sentenced

Criminal Procedure — Defence — Alibi — Criminal Procedure Code s 402A — Whether complied — Purpose of giving required statutory notice — Whether trial judge correct in excluding evidence relating to alibi defence

The eight appellants herein were the students of Sekolah Menengah Agama Dato' Klana Petra Maamor, Ampangan in the district of Seremban. They were charged under s 302 read together with s 149 of the Penal Code ('the Code') for the murder of one Muhamad Farid bin Ibrahim, a student of the same school. The merciless attack on the victim by the eight appellants practically killed the victim on the spot. There were twenty four external injuries on the victim. The victim's death was caused by head and abdominal injuries due to blunt instruments. The victim did not even retaliate. There were four eye-witnesses who witnessed the whole episode. They testified as to the roles played by all the eight appellants. The High Court found all the eight appellants guilty as per the charge and ordered them to be detained in prison during the pleasure of His Royal Highness, the Yang di Pertuan Besar of Negeri Sembilan pursuant to s 97(2)(b) of the Child Act 2001 ('the Act'). Aggrieved by the said decision, all the eight appellants appealed to this court against the findings of guilt and the detention orders. The appellants' defences were mere denials and they also raised the defence of alibi.

Held, dismissing the appeals and affirming the decision of trial judge:

(1) The injuries found on the victim were intentionally inflicted and were sufficient in the ordinary course of nature to cause death of the victim based on the evidence of the doctor. Where the injuries inflicted were fatal, the intention to inflict those injuries must be to cause the death of the victim. And such an intention can be assumed (see para 120).

(2) The number of blows which the victim received from the eight appellants could not be viewed in isolation from the nature of those blows. The parts of the body on which those blows landed were concentrated on the head of the victim. The victim was unconscious and the striking of further blows, on his body, although such blows might not ordinarily be dangerous would certainly indicate an intention on the part of the eight appellants to cause the victim more injury than would be caused by an ordinary beating. No one in the position of the victim would be able to survive when further blows were given (see para 121).

(3) Looking at the injuries and the concerted blows on the victim by all the appellants, it is relatively easy to infer the intention to kill. Indeed, the more severe the wounds and the more numerous they are, the more likely it is that intent will be inferred (see para 124).

(4) All the eight appellants were, in no way, denied of a fair trial. They valiantly put forth their defence, in the clearest way, and was not in any way prejudiced. It was quite obvious that at the trial, a well structured defence was put up for the learned High Court judge to take into account which he did. In short, there was no miscarriage of justice in whatever manner or form that can be detected by this court (see para 179).

(5) In relation to the defence of alibi, the purpose of giving the required statutory notice as provided in s 402A of the Criminal Procedure Code is quite obvious ie to give the police adequate opportunity to investigate any alibi defence before hand and, at the same time, to interview any witnesses who are to testify in support of it. If the accused failed to give the requisite notice, he could not give evidence in support of that alibi. This was exactly what had happened here (see paras 180–181).

[Bahasa Malaysia summary

Lapan perayu di sini merupakan pelajar-pelajar Sekolah Menengah Agama Dato' Klana Petra Maamor, Ampangan dalam daerah Seremban. Mereka dituduh di bawah s 302 dibaca bersama s 149 Kanun Keseksaan kerana membunuh Muhamad Farid bin Ibrahim, seorang pelajar di sekolah yang sama. Serangan tanpa belas kasihan ke atas mangsa oleh lapan perayu tersebut

A boleh dikatakan telah membunuh mangsa pada masa itu juga. Terdapat 24 kecederaan luaran ke atas mangsa. Kematian mangsa disebabkan oleh kecederaan di kepada dan abdomen akibat alat tumpul. Mangsa tidak melawan langsung. Terdapat empat saksi kejadian yang telah menyaksikan keseluruhan episod tersebut. Mereka telah memberi keterangan berhubung
B peranan yang dimainkan oleh kesemua lapan perayu tersebut. Mahkamah Tinggi mendapati kesemua lapan perayu bersalah seperti yang dituduh dan memerintah mereka ditahan di penjara atas perkenan Yang di Pertuan Agong, Yang di Pertuan Besar Negeri Sembilan menurut s 97(2)(b) Akta Kanak-Kanak 2001. Terkilan dengan keputusan tersebut, kesemua lapan
C perayu telah merayu ke mahkamah ini terhadap penemuan bersalah dan perintah-perintah tahanan. Pembelaan perayu-perayu hanya penafian semata-mata dan mereka juga telah membangkitkan pembelaan alibi.

D

Diputuskan, menolak rayuan-rayuan dan mengesahkan keputusan hakim perbicaraan:

(1) Kecederaan yang ditemui pada mangsa diakibatkan dengan sengaja dan
E mencukupi dalam keadaan yang biasa mengakibatkan kematian mangsa berdasarkan keterangan doktor. Di mana kecederaan yang dialami memudaratkan, seperti dalam rayuan ini, niat untuk mencederakan hendaklah mengakibatkan kematian mangsa. Dan niat sedemikian boleh diandaikan (lihat perenggan 120).

F (2) Bilangan pukulan yang diterima oleh mangsa daripada lapan perayu tersebut tidak boleh dilihat secara berasingan berdasarkan sifat pukulan tersebut. Bahagian badan yang menerima pukulan tersebut bertumpu pada kepala mangsa. Mangsa tidak sedarkan diri dan penerimaan pukulan seterusnya pada badannya, meskipun pukulan sebegitu
G mungkin tidak berbahaya biasanya semestinya menunjukkan niat di pihak kelapan-lapan orang perayu tersebut untuk menyebabkan mangsa menerima kecederaan lebih daripada yang mungkin disebabkan oleh pukulan biasa. Tiada seorang pun dalam kedudukan mangsa mungkin dapat hidup jika pukulan seterusnya diterima (lihat perenggan 121).

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(3) Berdasarkan kecederaan tersebut dan pukulan bertubi-tubi ke atas mangsa oleh kesemua perayu, agak mudah untuk membuat inferens tentang niat untuk membunuh. Sememangnya, jika kecederaan itu lebih teruk dan banyak, maka lebih kemungkinannya untuk membuat
I inferens wujud niat tersebut (lihat perenggan 124).

(4) Kesemua lapan perayu itu, tidak dalam apa cara pun, telah dinafikan perbicaraan yang adil. Mereka telah dengan berani mengemukakan pembelaan mereka, sejelas yang mungkin, dan tidak dalam apa cara pun terdapat prasangka. Adalah jelas bahawa semasa perbicaraan, pembelaan

yang diatur dengan baik telah dikemukakan agar diambil kira oleh hakim Mahkamah Tinggi yang mana beliau berbuat demikian. Pendek kata, tiada ketidakadilan berlaku dalam apa cara atau bentuk yang boleh dikesan oleh mahkamah ini (lihat perenggan 179).

(5) Berkaitan pembelaan alibi, tujuan memberikan notis statutori yang dikehendaki seperti yang diperuntukkan dalam s 402A Kanun Prosedur Jenayah adalah jelas iaitu untuk memberikan pihak polis peluang sewajarnya untuk menyiasat terlebih dahulu jika terdapat sebarang pembelaan alibi dan, pada masa yang sama, menyoal mana-mana saksi yang akan memberi keterangan menyokongnya. Jika tertuduh gagal untuk memberikan notis yang diperlukan, dia tidak boleh memberikan keterangan menyokong alibi tersebut. Inilah yang berlaku di sini (lihat perenggan 180–181).]

Notes

For a case on s 149 of the Penal Code, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) para 1388.

For cases on alibi, see 5(2) *Malall's Digest* (4th Ed, 2007 Reissue) paras 1665–1691.

For cases on s 302 of the Penal Code, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1520–1579.

Cases referred to

Attorney General of Hong Kong v Wong Muk Ping [1987] 1 AC 501, CA (refd)
Balachandran v PP [2005] 2 MLJ 301, FC (refd)
Chai Ko Chim v Regina [1958] SCR 25 (refd)
Chandran & Ors v PP [1992] 2 SLR 265, CA (refd)
Chan Ming Cheng v PP [2002] 3 MLJ 733, CA (refd)
CN Krishna Murthy v Abdul Subban and another [1965] 1 Cri LJ 565 (refd)
Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232, FC (refd)
David Colin Winner (1995) 79 A Crim R 528
Dayaram and another v State of Madhya Pradesh, thr PS Dhangaon [1992] 3 Cri LJ 3154 (refd)
Director of Public Prosecutions v Kilbourne [1973] AC 729, HL (refd)
Faqira v State AIR 1955 Allahabad 321 (refd)
Herchun Singh & Ors v PP [1969] 2 MLJ 209, FC (refd)
Ismail bin Hussin v PP [1953] MLJ 48, CA (refd)
Jai Prakash v State (Delhi Administration) [1991] 2 SCC 32 (refd)
James v R (1971) 55 Cr App R 299 (refd)
Juraimi bin Husin v PP, Mohd Affandi bin Abdul Rahman & Anor v PP [1998] 1 MLJ 537, CA (refd)
Kamta Prasad v State of Uttar Pradesh AIR 1994 SC 1519 (folld)
Khoo Hi Chiang v PP and another appeal [1994] 1 MLJ 265, SC (refd)
Krishnan & Anor v PP [1981] 2 MLJ 121; [1982] CLJ (Rep) 152, FC (refd)

Lai Kim Hon & Ors v PP [1981] 1 MLJ 84, FC (refd)
Lalji & Ors v State of UP AIR 1989 SC 754 (refd)
Lee Chin Kee v PP [1935] MLJ 157, HC (refd)
Lee Fah Sang v PP [1967] 2 MLJ 163, FC (refd)
Lim Heng Soon & Anor v PP [1970] 1 MLJ 166, FC (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65, CA (refd)
Lorensus Tukan v PP [1988] 1 MLJ 251, SC (refd)
Mohamed Salleh v PP [1969] 1 MLJ 104, FC (refd)
Moh Yee Chong (f) & Anor v PP [1955] MLJ 115, HC (refd)
PP v Datuk Haji Harun bin Haji Idris (No 2) [1977] 1 MLJ 15, HC (refd)
PP v Ginder Singh & Chet Singh [1948] MLJ 194, HC (refd)
PP v Muhamad Nasir bin Shaharuddin & Anor [1994] 2 MLJ 576, HC (refd)
PP v Ong Cheng Heong [1998] 6 MLJ 678, HC (refd)
PP v Sanassi [1970] 2 MLJ 198, HC (refd)
PP v Sarjeet Singh & Anor [1994] 2 MLJ 290, HC (refd)
PP v Sa'ari Jusoh [2007] 2 CLJ 197, FC (refd)
Pendakwa Raya v Ishak bin Hj Shaari & other appeals [2003] 4 MLJ 585, CA (refd)
Ramalingam Pillay v The Crown [1905] 9 SSLR 99 (refd)
Ram Kumar v State of Rajasthan AIR 1970 Vol 57 Raj 60 (refd)
Ram Lal and others v King Emperor [1945] 46 Cr LJ 728 (refd)
Ram Swaroop v State of Rajasthan [1994] Cri LJ 596 (folld)
Ramkishore Patel and others v State of Madhya Pradesh [1997] 1 Cri LJ 207; [1994] 2 EFR 186 SC (folld)
Ravji Alias Ram Chandra v State of Rajasthan [1996] 2 SCC 175 (refd)
Regina v Lucas (Ruth) [1981] QB 720, CA (refd)
Regina v Koomah [1808–84] 3 Ky 67 (refd)
Sanku Sreedharan Kottukallil Veettil Konathadi Kara v State of Kerala AIR 1970 Vol 57 Ker 98 (refd)
Sainal Abidin bin Mading v PP [1999] 4 MLJ 497, CA (refd)
See Yew Poo v PP [1949] MLJ 131, HC (refd)
Sheo Swarup v King-Emperor AIR 1934 PC 227 (refd)
Sim Yew Thong v Ng Loy Nam Thomas and other appeals [2000] 4 SLR 193 (refd)
Sukha and others v State of Rajasthan AIR 1956 SC 513 (refd)
Tan Ewe Huat v PP [2004] 1 MLJ 559; [2004] 1 CLJ 521, FC (refd)
Tham Kai Yau & Ors v PP [1977] 1 MLJ 174 (folld)
The King v Job Whitehead [1929] 1 KB 99 (refd)
The State v Gurcharan Singh AIR 1952 Punj 89 (refd)
Vasan Singh v PP [1988] 3 MLJ 412, SC (folld)
Wee Toon Boon v PP [1976 2 MLJ 191; [1975–1977] 1 SLR 498, HC (refd)
Wong Ah Kee v PP [1948–1949] Supp MLJ 23, HC (refd)

Legislation referred to

Child Act 2001 s 97(2)(b), (4)(a)
Courts of Judicature Act 1964 s 60
Criminal Procedure Code ss 180, 180(4), 402A, 422
Evidence Act 1950 ss 155, 167
Federal Constitution art 42
Penal Code ss 34, 141, 149, 299, 300, 302, 304

Appeal from: Criminal Trial No 45–4 of 2004 (High Court, Seremban)

Haresh Mahadevan (Ramzani Idris and Mohd Aimi Zaini with him) (Haresh Mahadevan & Co and Zainuritha & Co) for the appellants.

Awang Armadajaya Awang Mahmud (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent/prosecution.

Abdul Malik Ishak JCA (delivering judgment of the court):

INTRODUCTION

[1] All the eight appellants were charged jointly at the instance of the public prosecutor before the learned High Court judge presiding in Seremban and the charge against them were framed as follows:

> Bahawa kamu bersama-sama pada 28 March 2004 jam di antara 10.30 pagi hingga 4.15 petang di Dom Osman, Tingkat 2, Asrama Putra, Sekolah Menengah Agama Dato' Klana Petra Maamor, Ampangan, di dalam daerah Seremban, di dalam negeri, Negeri Sembilan, dengan tujuan bersama telah membunuh seorang lelaki Melayu bernama MUHAMAD FARID BIN IBRAHIM K/P No: 881211-56-5435, oleh itu kamu telah melakukan kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan (Akta 593) dan dibaca bersama-sama dengan Seksyen 149 Kanun yang sama.

[2] After a full trial, the learned High Court judge found all the eight appellants guilty as per the charge and ordered them to be detained in a prison during the pleasure of His Royal Highness, the Yang DiPertuan Besar of Negeri Sembilan pursuant to s 97(2)(b) of the Child Act 2001.

[3] Aggrieved by the decision of the learned High Court judge, all the eight appellants are now appealing to this court against the findings of guilt and the detention orders.

[4] One common denominator runs through this appeal. It is this. That all the eight appellants were students of the Sekolah Menengah Agama Dato' Klana Petra Maamor, Ampangan in the district of Seremban, in the State of

Negeri Sembilan. And the deceased by the name of Muhamad Farid bin Ibrahim — the victim, was a student of the same school (the 'victim').

NARRATION OF THE FACTS

[5] Four main prosecution witnesses testified as to what had happened on that fateful day. They were:

(a) Muhd Firdaus bin Azmy (Firdaus Azmy) (SP3);

(b) Muhd Afiq bin Muhd Yusri (Afiq) (SP4);

(c) Muhd Nurul Ashraf bin Abd Hait (Ashraf) (SP6); and

(d) Muhd Hazwan bin Amran (Hazwan) (SP8).

[6] According to Firdaus Azmy (SP3), he was a form two student and he stayed in the Amru Dorm in the school hostel together with the victim at the material time. Firdaus Azmy (SP3) testified that in the early morning of 28 March 2004, a form one student by the name of Ikmal Hisham came to the Amru Dorm to see the victim as he wanted to borrow the victim's electric kettle. The victim refused to lend the electric kettle to him. Ikmal Hisham then went back to his own room. A short while later, one Aizat — a form two student, came with the same intention. The victim became agitated and scolded Aizat. All the same, the victim lent the electric kettle to Aizat and made the following remarks, '*Abang form 5 tak nak tidur ke*?' (see p 39 of the appeal record at *Jilid 1*).

[7] After Aizat went back, Adi and Haziq (fifth appellant) came into the Amru Dorm and they scolded the victim. They were seen by Firdaus Azmy (SP3) standing near to the victim's bed. According to Firdaus Azmy (SP3) he could recognise Adi but not Haziq (fifth appellant). Firdaus Azmy (SP3) too was unsure as to the contents of the conversation.

[8] According to Firdaus Azmy (SP3), Rasyidan (seventh appellant) then came into the Amru Dorm and scolded the victim. Rasyidan (seventh appellant) went up to the victim's bed and yelled at the victim loudly using these words, *'kau jangan nak tunjuk kepala kat sini — kang den ambil cerek tu dan baling kek kepala kau'* (see p 40 of the appeal record at *Jilid 1*). Firdaus Azmy (SP3) often see Rasyidan (seventh appellant) at the school hostel and so he was in a position to recognise him.

[9] Firdaus Azmy (SP3) testified that on 28 March 2004 at about 11.30am while he was at the Amru Dorm located on the fourth floor of the school hostel, Ikmal Hisham called him to come down to the Osman Dorm located on the third floor of the school hostel. Firdaus Azmy (SP3) complied and

there he saw Haikal (first appellant), a form five student. Firdaus Azmy (SP3) recognised and could identify Haikal (first appellant). A

[10] Now, at the Osman Dorm, Firdaus Azmy (SP3) saw *someone* stepping on the victim's head. Unfortunately, Firdaus Azmy (SP3) could not recognise the person who stepped on the victim's head. According to Firdaus Azmy (SP3), the victim was lying down on the cement floor with his face facing downwards and the victim appeared to be unconscious. At this point of time, Firdaus Azmy (SP3) saw Adam (sixth appellant) directed the victim to stand up and after the victim stood up, Adam (sixth appellant) then kicked the victim. Naturally, the victim fell and he then got up again – only to be kicked, once again, by Adam (sixth appellant). That kick landed on the victim's stomach which in turn caused the victim to fall flat on his back on the cement floor. According to Firdaus Azmy (SP3), he was unsure of the victim's condition after the victim fell onto the cement floor. But Firdaus Azmy (SP3) recognised Adam (sixth appellant) and was certain that the latter had kicked the victim. Firdaus Azmy (SP3) too was able to identify Adam (sixth appellant). B C D

[11] Having seen these unpleasantries, Firdaus Azmy (SP3) then went back to his own room at the school hostel. He was not sure who else was in the Osman Dorm. However, he was certain that there were more people in the Osman Dorm but he could not remember the exact number of people there. E

[12] According to Firdaus Azmy (SP3), after the zohor prayers he went again to the Osman Dorm because he was told that a form five student had called him. And on arrival at the Osman Dorm, he was told by a form five student that he should say that the victim fell down on the staircase if any one were to ask him. However, he was unsure of the identity of that particular form five student. He further testified that all the students from the school hostel were at the Osman Dorm at that point of time. The victim, at that time, was seen lying on the bed unconscious and there were people massaging him. Firdaus Azmy (SP3) then returned to his dorm. F G

[13] Once again, after the Asar prayers, Firdaus Azmy (SP3) was called to the Osman Dorm. He was not certain who called him to go there. He went and upon arrival he saw the victim lying on the bed on his back. He saw the victim's nose was bleeding. A form five student then told Firdaus Azmy (SP3) that the story has now changed. Instead of saying that the victim fell on the right side of the staircase, it was suggested that the victim fell at the left side of the staircase. But Firdaus Azmy (SP3) was unsure as to who had told him about the new version. He was certain that apart from the victim and himself at the Osman Dorm, there were other forms five, four, three, two and one students. After that short meeting, he went back to his dorm. H I

[14] Another important eye witness for the prosecution would be Afiq (SP4), 16 years of age who studied in the same school as the victim and the appellants. He also stayed in the Amru Dorm of the school hostel as the roommate of the victim. He testified that at around midnight of 28 March 2004 while he was in his dorm, he heard a commotion. Two form five boys came to borrow an electric kettle from the victim. He heard them quarrelling. He also heard the victim scolding the two form five boys for disrupting the victim's sleep. Finally, the two form five boys managed to borrow the electric kettle from the victim.

[15] On that fateful morning, Afiq (SP4) was at the Amru Dorm doing his science notes. The victim came up to Afiq (SP4) and said that he wanted to get a haircut. Afiq (SP4) ignored the victim. Afiq (SP4) noticed that Ashraf (SP6) was together with the victim. Approximately 10 minutes later, Afiq (SP4) heard loud noises coming from downstairs. Afiq (SP4) then went downstairs to the second floor of the school hostel. According to Afiq (SP4) the noise sounded like things were being broken. Curious, Afiq (SP4) went to the Osman Dorm. There he saw the victim being beaten by eight boys. He, however, only managed to recognise three persons, namely Mohamad Afif (third appellant), Adam (sixth appellant) and Haikal (first appellant).

[16] According to Afiq (SP4), he saw Mohamad Afif (third appellant) hit the victim on the back of the victim's head with a red pail. The victim screamed in pain. Afiq (SP4) was able to recognise Mohamad Afif (third appellant). The sting of Afiq's (SP4's) testimony can be fully appreciated to its fullest extent by reproducing verbatim what Afiq (SP4) said before the learned High Court judge (see p 58 of the appeal record at *Jilid 1*):

> Sampai di Dom Osman saya lihat Farid (victim) dipukul oleh beberapa orang pelajar, oleh lapan orang. Saya Nampak Farid (victim) terbaring di atas lantai. Di antara lapan orang ini saya hanya cam 3 orang pelajar. Mereka sedang memukul. Mereka ialah Mohd Afif (third appellant). Dia pukul Farid (victim) dengan menggunakan baldi merah. Pada masa itu saya ada di koridor. Saya Nampak Farid (victim) dipukul dengan baldi merah di bahagian belakang kepala. Farid (victim) menjerit. Saya jarang jumpa Mohd Afif (third appellant) tetapi saya kenal dia. Jika jumpa/tengok saya boleh cam. Dia ada di Mahkamah.

[17] According to Afiq (SP4), Adam (sixth appellant) also assaulted the victim. Adam (sixth appellant) was seen kicking the victim's back with a football boot. The victim was lying on the floor with his face facing downwards. Afiq (SP4) did not see anything else that Adam (sixth appellant) did. Afiq (SP4) recognised Adam (sixth appellant) even though they did not meet often. In its original text, this was what Afiq (SP4) said (see p 59 of the appeal record at *Jilid 1*):

Seorang lagi yang memukul Mohd Farid (victim) ialah Mohd Adam (sixth appellant). Dia menyepak belakang Farid (victim) dengan menggunakan boot bola sepak. Mohd Farid (victim) terbaring di atas lantai — macam meniarap. Saya tak nampak lagi apa yang Adam (sixth appellant) buat. Saya kenal Adam (sixth appellant). Saya jarang jumpa dia. Saya boleh cam dia.

[18] Another episode which Afiq (SP4) saw was this. That he could recognise the third person who hit the victim's head against the locker. That Mohd Syafiq Ramdan and Mohd Hanif were also in the Osman Dorm. At p 50 of *Jilid 1*, Afiq's (SP4's) testimony in its original text was worded in this manner:

Orang ketiga saya tak berapa pasti. Dia menolak kepala Farid (victim) ke locker (almari).

[19] Afiq (SP4) was at the Osman Dorm and he witnessed the whole event for approximately eight minutes. Thereafter, Haikal (first appellant) chased him out. According to Afiq (SP4), Haikal (first appellant) was standing behind the window of the Osman Dorm and Afiq (SP4) recognised Haikal (first appellant).

[20] It was rather unfortunate that Afiq (SP4) was not able to see the condition of the victim before he left because he was chased away by Haikal (first appellant). Afiq (SP4) said (see p 60 of the appeal record at *Jilid 1*):

Semasa saya meninggalkan Dom Osman selepas dihalau saya tak sempat melihat Farid (victim).

[21] Immediately after the zohor prayers, Afiq (SP4) went back to the Osman Dorm because he wanted to see the victim's condition. There he saw some students and he also saw the victim lying unconscious on the bed. Afiq (SP4) was there for about five minutes and he then left to take his meal.

[22] At about 3pm of the same day, Afiq (SP4) once again went to the Osman Dorm after being called by a form one student. There the form five students asked all those present to conceal the truth. And that the person who asked them not to tell the truth was Haziq (fifth appellant). According to Afiq (SP4) he could recognise Haziq (fifth appellant).

[23] Later, Afiq (SP4) heard from Ustaz Hamzah that the victim had passed away.

[24] Learned counsel for Haikal (first appellant) cross-examined Afiq (SP4) and from the cross-examination it was revealed that Afiq (SP4) witnessed the

A incident from the corridors of the dorm and not in the dorm. Afiq (SP4), however, conceded that his vision was not fully clear when he saw the incident. Again, under cross-examination, Afiq (SP4) estimated the distance between him and the place of the incident to be 16 feet. But notwithstanding the distance, Afiq (SP4) categorically said that he saw the incident clearly and
B that he was not scared nor did he panick.

[25] Under re-examination, Afiq (SP4) was quick to say that his view was not obstructed by any clothes hanging by the window nor by the bright morning sun.
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[26] Yet another important eye witness for the prosecution was Ashraf (SP6), 16 years of age who studied in the same school as the victim and the appellants. Ashraf (SP6) also stayed in the same dorm as the victim — and
D that would be the Amru Dorm. According to Ashraf (SP6) on that fateful day at about 12.30am as he was soundly asleep he was awaken by the loud arguments between Rasyidan (seventh appellant) and the victim. He saw Rasyidan (seventh appellant) scolded the victim. The distance between his bed and that of the victim was approximately 20 feet. Initially, the Amru
E Dorm was dark but according to Ashraf (SP6) someone had switched on the light when Rasyidan (seventh appellant) was shouting at the victim. Being short-sighted, Ashraf (SP6) put on his spectacles after he woke up and he could see and recognise Rasyidan (seventh appellant). According to Ashraf (SP6), he went up to the victim and asked as to why Rasyidan (seventh
F appellant) came and shouted at him. The victim told him that Rasyidan (seventh appellant) wanted to borrow his electric kettle.

[27] At about 11.30am on that fateful day, Ashraf (SP6) was with Afiq (SP4) together with the victim doing their science notes. Ashraf (SP6) did not
G notice when the victim went down to the Osman Dorm. According to Ashraf (SP6), he heard noises coming from the Osman Dorm and he went downstairs to see what was happening. There he saw Haziq (fifth appellant) holding an iron rod and questioning the victim. At that point of time, Ashraf (SP6) was walking by the corridor of the Osman Dorm and he was able to
H see what was happening through the open door. Ashraf (SP6) recognised Haziq (fifth appellant). Unfortunately, Ashraf (SP6) did not hear the conversation between Haziq (fifth appellant) and the victim. Thereafter, Ashraf (SP6) returned to his dorm.

I **[28]** Once again, Ashraf (SP6) heard a loud commotion below his dorm. Together with Afiq (SP4), they rushed downstairs to the Osman Dorm. *There Ashraf (SP6) saw Rasyidan (fifth appellant) pounded hard (menghentak) the victim's head twice against the locker*. Ashraf (SP6) also saw Farhan Faiz (eighth appellant) kicking the victim's back. Ashraf (SP6), however, was unsure as to

the number of times Farhan Faiz (eighth appellant) kicked the victim. Ashraf (SP6) testified that the victim was actually standing when the kick was made and Farhan Faiz (eighth appellant) had kicked the victim on the victim's upper back.

[29] Ashraf (SP6) also saw Mohamad Afif (third appellant) *pounded hard (menghentak) at the victim's head with a red pail*. Ashraf (SP6) said that he could recognise the red pail and he told the learned High Court judge that the red pail was slightly broken. Ashraf (SP6) further testified that *the victim's head was hit from the back as the victim was about to fall flat on his abdomen*. According to Ashraf (SP6), *the victim's legs were tied with a blue plastic rope* which he could identify.

[30] Ashraf (SP6) also said that he saw Adam (sixth appellant) kicked the victim's back when the victim was still standing. And Ashraf (SP6) said that he recognised Adam (sixth appellant).

[31] Ashraf (SP6) also testified that he saw Syafiq (second appellant) kicked the victim's stomach while the victim was still standing. However, Ashraf (SP6) was unsure as to the number of times Syafiq (second appellant) kicked the victim. Again, Ashraf (SP6) said that he recognised Syafiq (second appellant).

[32] Unfortunately, Ashraf (SP6) and Afiq (SP4) were prevented from seeing more of what was happening at the Osman Dorm because they were chased away by Haikal (first appellant). And, of course, both Ashraf (SP6) and Afiq (SP4) knew Haikal (first appellant).

[33] On his return to his room, Ashraf (SP6) was called by Ahmad Rohimi, a form three student, to attend a meeting at the Osman Dorm. Ashraf (SP6) attended the meeting which was called by Haziq (fifth appellant). There, Ashraf (SP6) saw that all the students attended the meeting. Ashraf (SP6) also saw Haziq (fifth appellant) stood up and said that if the warden were to ask they were supposed to say that the victim fell in the toilet. And Ashraf (SP6) too saw the victim lying on the bed with his eyes closed and his lips bleeding. The victim's saliva was also slowly dripping.

[34] Again after the evening prayers, Ashraf (SP6) was called by Ahmad Rohimi to come down to the Osman Dorm. All the other students were also called. There according to Ashraf (SP6), Haziq (fifth appellant) wanted someone to be a witness to say that the victim fell in the toilet. Five minutes later, Ashraf (SP6) went back to his dorm.

[35] Another meeting was also held at the Osman Dorm after the Asar prayers. Ashraf (SP6) attended this meeting and there he heard Haziq (fifth appellant) said that it will be illogical to say that the victim fell in the toilet. Haziq (fifth appellant) said that the story has to be changed by saying that the victim fell on the staircase. Ashraf (SP6) saw the victim in the same condition as described earlier.

[36] The fourth important witness for the prosecution was Hazwan (SP8), 16 years of age who studied in the same school as the victim and the appellants. Hazwan (SP8) stayed at the Amru Dorm and on that fateful day at about 11am he was awaken by a loud noise coming from the Osman Dorm. He then proceeded to the Osman Dorm and upon arrival at the front door he saw Adam (sixth appellant) kicking the victim's back. The victim only moved a little. Hazwan (SP8) said that he knew Adam (sixth appellant).

[37] Hazwan (SP8) also saw Firdaus (fourth appellant) stepping barefooted on the victim's head when the victim was lying on the floor on his back. Hazwan (SP8) recognised Firdaus (fourth appellant).

[38] Hazwan (SP8) testified further. He said that he saw Mohamad Afif (third appellant) pounded hard (menghentak) at the back of the victim's head with a red pail. Hazwan (SP8) also recognised Mohamad Afif (third appellant).

[39] Finally, Hazwan (SP8) also saw Haikal (first appellant) holding onto the victim's back in a *bear like* manner before deliberately dropping him onto the cement floor. The victim fell on his back. The victim was seen to be weak and could not do anything. Hazwan (SP8) recognised Haikal (first appellant). In its original text, Hazwan (SP8) testified in this fashion (see p 153 of the appeal record at *Jilid 1*):

> Saya ada melihat Haikal (first appellant) memaut badan arwah (victim) dan menghantukkannya di bahagian belakang kepalanya. Haikal (first appellant) memaut leher arwah (victim) dengan tangan kanannya dan menjatuhkannya ke belakang. Arwah (victim) jatuh terlentang di lantai simen. Arwah (victim) kelihatan lemah dan tidak bertindak apa-apa.

THE CAUTIONED STATEMENT

[40] The cautioned statement of Haziq (fifth appellant) was admitted by the learned High Court judge in evidence as exh 'P23' notwithstanding that the voluntariness was challenged by learned counsel. There was a trial within a trial and the learned High Court judge ruled as to the admissibility of Haziq's (fifth appellant's) cautioned statement (*Dato Mokhtar bin Hashim &*

Anor v Public Prosecutor [1983] 2 MLJ 232; *Johnson Tan Han Seng v Public Prosecutor*, *Soon Seng Sia Heng v Public Prosecutor*, *Public Prosecutor v Chea Soon Hoong*, *Teh Cheng Poh v Public Prosecutor* [1977] 2 MLJ 66).

[41] In his cautioned statement, Haziq (fifth appellant) narrated the following events. That on 28 March 2001 at or about 12am he and Mohamad Afif (third appellant) wanted to eat instant noodles. Since they did not have hot water, they wanted to borrow an electric kettle from the victim. Haziq (fifth appellant) was angry with the victim because when the victim lent it, the victim scolded a form one boy who was sent by Mohamad Afif (third appellant) and Haziq (fifth appellant). The latter felt that the victim was not sincere and was talking behind the latter's back.

[42] Haziq (fifth appellant) then went into details in his cautioned statement. According to Haziq (fifth appellant), on that fateful day at about 11am, he sent a form one student to call the victim from the Amru Dorm. When the victim arrived, Haziq (fifth appellant) asked the victim if he was not satisfied and not happy with the form five students. The victim allegedly kept quiet and ignored the question. Haziq (fifth appellant) repeated the question and was met with a similar response from the victim. Haziq (fifth appellant) became angry and slapped the victim's face. Other form five students joined in and started beating the victim and asked why the victim was anti-form five students. All these happened at the Osman Dorm. Haziq (fifth appellant) then left the Osman Dorm.

[43] Later Haziq (fifth appellant) returned to the Osman Dorm to chit chat with his friends. There, according to him, he saw Rasyidan (seventh appellant) asked the other form five students to stop hitting the victim for fear that something untoward might happen.

[44] Continuing with his cautioned statement, Haziq (fifth appellant) said that he saw Mohamad Afif (third appellant) hit the victim's head with a red pail. And when Haziq (fifth appellant) went into the Osman Dorm, he saw Haikal (first appellant) pushed the victim to the floor backwards causing the victim's head to hit the cement floor. The victim became unconscious. While the rest of the students went for lunch, Haziq (fifth appellant) and Adi remained at the Osman Dorm and they approached the victim to ascertain whether he was alright. They both lifted the victim and placed him on the bed. The victim did not respond at all. They left the victim alone thinking that the victim needed a rest. Later when Haziq (fifth appellant) returned to the Osman Dorm with the other form five students, he realised that the victim's hands and legs were cold. Haziq (fifth appellant) then asked the other students to massage the victim's hands and legs thinking that it would ease the blood circulation.

A **[45]** When Haziq (fifth appellant) realised that the victim's condition was deteriorating, he and Syafiq (second appellant) then went to look for the hostel's warden. The victim was later sent to the Seremban Hospital but was pronounced dead on arrival.

B THE EVIDENCE OF DR SHARIFAH SAFOORAH BT SYED ALWI (SP14)

[46] According to the doctor, twenty-four (24) external injuries were detected on the victim, namely:

C

(a) six head injuries;

(b) one injury on the thorex;

(c) four injuries at the upper part of the body;

D

(d) eight injuries at the lower part of the body; and

(e) five injuries at the rear part of the body.

E **[47]** All these injuries, according to the doctor, were sufficient in the ordinary course of nature to cause the death of the victim. The good doctor further testified that the victim sustained the following internal injuries:

(a) ada lebam pada kulit kepala bahagian vertex (bahagian atas kepala);

F

(b) terdapat pendarahan otak di sub-dural kedua-dua belah otak sebanyak 100g;

(c) ada juga pendarahan di sub-arachnoid iaitu di seluruh otak;

G

(d) terdapat 300 cc darah dalam ruang abdomen dan bahagian posterior perut telah pecah dengan pendarahan di keliling; dan

(e) terdapat juga lebam di bahagian hati sebelah kiri.

H **[48]** The good doctor listed the cause of death of the victim to be *head and abdominal injuries due to blunt instrument*.

THE DEFENCE STORY

I **[49]** All the appellants except Haziq (fifth appellant) gave their evidence under oath. Haziq (fifth appellant) gave his evidence from the dock.

[50] In a nutshell, the appellants' defences were mere denials and they also raised the defence of alibi which failed to comply with s 402A of the Criminal

Procedure Code.

Defence of Haikal (first appellant)

[51] Haikal (first appellant) was a form five student of the same school where the victim and the other appellants were studying. He enrolled at the school hostel in 2004 and he admitted that he knew the victim as well as Afiq (SP4). He said that his relationship with both of them were good.

[52] On that fateful day at about 9am, he heard that the warden wanted to organise a *gotong-royong*. He went downstairs from his hostel dorm and saw other students were assembled there according to their respective dorms. The warden then assigned the duties to the students. He could not remember when the *gotong-royong*ended but he said that after it ended he went up to his dorm — the Amru Dorm. He rested for a short while and then took his bath before he went to the Osman Dorm to meet his friend there. That was about 11.40am. He came downstairs and as he was walking towards the Osman Dorm, he saw some boys were crowding the corridor. He alleged that he chased all the boys away and after that, he stood in front of the door of the Osman Dorm.

[53] According to him, in the Osman Dorm, he saw six to seven people surrounded the victim. He said that he could not recognise who were those people because there were too much movements in the dorm. He said that those movements pertained to the movements of hitting the victim. He went to check the victim who was at the centre of the dorm surrounded by his assailants. He said that he noticed Afiq (SP4) standing at the corridor. He also saw Afiq (SP4) through a window. Haikal (first appellant) said that he then chased Afiq (SP4) away because he did not want Afiq (SP4) to suffer a similar fate as the victim.

[54] He saw the victim was very weak and could not stand still. The victim was in a standing position. He alleged that he went near the victim and pushed everyone who was near the victim. He said that the victim was almost falling on his back. He said that he tried to hold onto the victim to prevent the victim from falling but since the victim was heavy, he could not stop the victim from falling. He said that the victim fell to the ground backwards looking up. He wanted to lift the victim up but he saw that the victim was groaning in pain and he only managed to hold the victim's head. He then rubbed the victim's head with a warm cloth.

[55] He said that Adam (sixth appellant) then came up to him and asked as to what had happened to the victim. He ignored Adam's (sixth appellant's) query and continued rubbing the victim's head. Later, he heard Haziq (fifth

appellant) and Adi asked as to what had happened to the victim. He replied that the victim fell down on the cement floor. He said that Haziq (fifth appellant) and Adi asked the victim whether the victim was alright. The victim answered by nodding slowly. Shah Helmi (SP9) also enquired as to what had happened to the victim. He told Shah Helmi (SP9) that the victim fell on the floor.

[56] Shortly thereafter, Mohamad Afif (third appellant) and Rasyidan (seventh appellant) entered the Osman Dorm. They also asked as to what had happened. Before Haikal (first appellant) could answer, Mohamad Afif (third appellant) became furious when he saw that his red pail was broken. Haikal (first appellant) just kept quiet and so were the rest of the students who were at the Osman Dorm. According to Haikal (first appellant), he did not know how did the red pail break.

[57] He heard Mohamad Afif (third appellant) invited Rasyidan (seventh appellant) and Shah Helmi (SP9) to go for lunch. He also saw Firdaus (fourth appellant) standing at the corridor and calling him to go for lunch. So, he left the Osman Dorm leaving the victim behind.

[58] He returned to the Osman Dorm after lunch in order to check on the victim. He saw the victim lying on the bed. Noh Kamidi was massaging the victim.

[59] He said that he fell asleep at the Osman Dorm and when he woke up he heard commotions and people were crowding his dorm. He did not know why everyone was assembling in his dorm. He said that he did not take part in the assembly and that he went to the mosque. He also saw that the victim was sent to the hospital.

Defence of Syafiq (second appellant)

[60] He was a student of the same school and he stayed at the Ali Dorm on the third floor. He spoke about the *gotong-royong* where he was assigned to clean the toilet on the third floor. The *gotong-royong* ended at 11am on that fateful day and he said that he went into his dorm to rest together with Arif Helmi and Adi. He claimed that he was listening to the radio until 12pm. After that he went to take his bath and he saw Firdaus (fourth appellant) coming out from the bathroom just after washing his shoes. He said that Firdaus (fourth appellant) stayed at the Omar Dorm on the third floor. After taking his bath, he was invited by Farhan Faiz (eighth appellant) to eat lunch packed by Farhan Faiz's mother. This was about 12.10pm. After lunch, he said that he together with Farhan Faiz (eighth appellant) went into the mosque to wait for the Zohor prayers.

[61] After the Zohor prayers, he claimed that he went back to the Ali Dorm and slept. He also said that Farhan Faiz (eighth appellant) also slept on the bed below him. He said that he was awakened by a loud noise asking all the students to go to the Osman Dorm. He then woke up Farhan Faiz (eighth appellant) and together they went to the Osman Dorm. This was around 3pm on that fateful day. At the Osman Dorm he saw quite a number of students there. It was quite a noisy situation and he saw the victim lying on the bed. He also saw Zulfaldi and another unidentified person massaging the victim. Someone apparently told him that the victim fell down in the toilet. A short while later, both he and Farhan Faiz (eighth appellant) returned to their own room to study.

[62] He said that he did not know anything about the victim until 4pm of that fateful day when someone who passed by his dorm told him that the victim will be sent to the hospital.

Defence of Mohamad Afif (third appellant)

[63] He was a resident and a monitor of the Osman Dorm. He said that after the *gotong-royong*, he and Rasyidan (seventh appellant) rested at the school compound. They were there for about 15 to 20 minutes. According to him, Rasyidan (seventh appellant) then went to take his bath while he remained at the school hall.

[64] He then went looking for Rasyidan (seventh appellant) at the Osman Dorm because Rasyidan (seventh appellant) did not come down and Rasyidan (seventh appellant) wanted to have lunch with him. He met Rasyidan (seventh appellant) at the staircase and instead of going for lunch, both of them went to look for Shah Helmi (SP9) at the Hamzah Dorm and later they proceeded to the Osman Dorm. On arrival at the Osman Dorm, he said that he saw the victim was lying down on the floor and he also saw his red pail was broken. According to him, there were approximately five people in the Osman Dorm, namely, Shah Helmi, Adi Khusaini, Haziq (fifth appellant), Adam (sixth appellant) and Haikal (first appellant).

[65] He saw that the victim was unconscious and he said that he was shocked to such an extent that he did not ask anyone as to what had happened to the victim. He said that he asked as to who had broken his red pail but no one answered. He then went for lunch.

[66] He returned to the Osman Dorm in order to check on the victim. He saw the victim was still on the floor. He said that he and Rasyidan (seventh appellant) tried to lift the victim to a nearby bed but to no avail. With the

help of Noh Kamidi they managed, he said, to lift the victim to the bed. He then left in order to meet Adam (sixth appellant) at the Abu Bakar Dorm.

[67] Between 3.15pm to 3.30pm on that fateful day, he said that he was asleep at the Osman Dorm after the Zohor prayers and he heard loud noises within the said dorm. He woke up and he saw the victim was still lying on the bed. He too saw Zulfadli, Mohd Fikri and Adam (sixth appellant) were massaging the victim. He said that he did not know what happened to the victim.

[68] After the Asar prayers, he said that he heard that the victim fell from the staircase. He too said that he saw a lot of people sending the victim to the hospital.

[69] He denied that he has any knowledge of any form five students scolding the victim at midnight of 28 March 2004. He too denied strongly that he hit the victim's head with a red pail. He also said that he did not conspire with the other appellants to say that the victim fell on the staircase. He denied that he was with the other appellants when they injured the victim and killed him.

Defence of Firdaus (fourth appellant)

[70] He said that on the morning of the incident, he was cleaning up his own room as part of the *gotong-royong* exercise. He completed it at 9.30am and he continued sleeping for approximately two hours. When he woke up, he went to the Osman Dorm to get his shoe brush back from Azirul who had borrowed it earlier. There he saw Redzuan Abdul Malek spoke to the victim. There, he also saw at least six to seven people but he could not recognise them because they were quite far from him.

[71] He said that he then went to the bathroom of the third floor. There he saw Syafiq (second appellant). He took his bath and then returned back to his dorm and he remained there for at least half an hour. He then proceeded to the Osman Dorm to invite Shafiq Ramzan for lunch. When he arrived at the Osman Dorm, he saw the victim lying in the middle of the said dorm and he also saw Haikal (first appellant) and so he invited Haikal (first appellant) for lunch.

[72] After lunch, he performed his Zohor prayers. After praying, he said that he played ping-pong with a form one student. He then heard a voice calling everyone to assemble at the Osman Dorm. He went to the Osman Dorm and he saw many people there. He said that he could not recognise

them as there were too many of them in the room. He said he was at the Osman Dorm for approximately five minutes and he did not hear anything there.

[73] He said that he only knew that the victim was brought to the hospital by the warden after the Asar prayers.

[74] He denied that on that day between 10am to 5pm that he had injured the victim. He said that he did not intend to kill the victim. He also said that he did not conspire with others to say that the victim fell from the staircase.

Defence of Haziq (fifth appellant)

[75] He elected to give his evidence in the dock. His statement from the dock was marked as exh 'D27' and there he denied entirely the evidence of Firdaus Azmy (SP3) which stated that he came to the Amru Dorm in the morning of 28 March 2004 and scolded the victim because the latter refused to lend the electric kettle.

[76] He said that after he had completed his *gotong-royong* at about 11am on that fateful day, he remained in his dorm and that would be the Hamzah Dorm. He then went down to make a telephone call accompanied by Adi Khusaini. However, he could not make that telephone call because there were other students there who wanted to use the telephone. On his way back to his dorm he heard loud noises and commotions at the Osman Dorm. He then went to the Osman Dorm with Adi Khusaini. From the door of the Osman Dorm he saw the victim was lying in the middle of the said dorm. He saw Haikal (first appellant), Mohd Hanif Zainudin, Mohd Zulkitri and Mohd Ridhuan near the victim. He asked them as to what had happened. They told him that Mohd Hanif Zainudin quarrelled with the victim. He then left the Osman Dorm to take his meal. He returned to the Osman Dorm after the Zohor prayers to see the victim who was at that time lying on the bed as though the victim was asleep. He then returned to his own dorm.

[77] At about 3pm of the same day, he went to the Osman Dorm and saw that the victim was unconscious. He panicked. He asked Shafiq Ramdan to accompany him to see the warden in order to ask the latter to bring the victim to the hospital.

[78] He denied holding an iron rod while questioning the victim as was said by Ashraf (SP6).

[79] He denied directing the students to keep quiet and not to tell the truth about the victim and to say that the victim either fell in the bathroom or fell from the staircase. According to him, his evidence as per exh 'D27' was told to Chief Inspector Prama Kumar at the time of his arrest but the said officer did not record it.

[80] In regard to his cautioned statement marked as exh 'P23', he categorically said that its contents were untrue. He said that his cautioned statement was motivated by inducement by both Chief Inspector Prama Kumar and the recording officer by the name of ASP Ng Fook Leong.

Defence of Adam (sixth appellant)

[81] He said that at the time and on the day in question, he was clearing up his locker in his room at the Abu Bakar Dorm. He took sleeping pills and woke up at approximately 11.15am when he heard a loud noise coming from the Osman Dorm. He did not go there. At about 11.50am when he wanted to go to the toilet, he passed by the Osman Dorm. He went in and saw the victim lying down on the floor at the centre of the dorm. He also saw Haikal (first appellant) massaging the victim's head with a hot cloth. He saw three individuals, namely, Azirul, Hanif and Shafiq Ramzan. He then went closer to the victim and, at the same time, he enquired of Haikal (first appellant) as to what had happened but the latter remained quiet.

[82] At about 3pm, he went again to the Osman Dorm because he saw people going in and out of that dorm. This time he went in to massage the victim. He said that he did not know as to what had happened to the victim.

[83] He said that at the assembly he heard that the victim fought with a student by the name of Hanif Zainuddin. But he could not remember who said it because there were far too many people in the Osman Dorm.

[84] He vehemently denied that he knew about the fight in the Amru Dorm by some form five students with the victim. He also denied that he had injured or kicked the victim. He explained that he had no problems with the victim and that his relationship with the victim was good.

Defence of Rasyidan (seventh appellant)

[85] He said that he attended the *gotong-royong* organised by the school which ended at about 11am. He then went to meet Mohamad Afif (third appellant) at the ground floor and both of them wanted to rest in the school hall. About 15 minutes later, he left to take his bath and he asked Mohamad Afif (third appellant) to remain in the school hall. As he proceeded to return

to his dorm which was the Hamzah Dorm, he saw a lot of people in the Osman Dorm. He saw between seven to eight people surrounded the victim and argued with him. He said that he could not recognise them because they were facing the other side. He could only identify Azirul Shazwan, Mohd Hanif and Mohd Shafiq Ramzan.

[86] He denied that he injured the victim at the material time. He said that he did not hit the victim's head against the locker. He said that he has no intention of murdering the victim. He said that he had a good relationship with the victim.

[87] He also denied any knowledge of the incident of borrowing the electric kettle from the victim. He further denied ever meeting the victim in regard to the issue of borrowing the electric kettle. He said that he was asleep in his dorm that night.

Defence of Farhan Faiz (eighth appellant)

[88] He stayed at the Amru Dorm and he participated in the *gotong-royong* exercise on that fateful day. At about 10.40am, both his parents came and met him under a tree near to the school hostel. His parents brought some food and clothing. He said that he was with his parents for approximately one hour.

[89] He said that he saw Shah Helmi was talking over the telephone and he too saw two students, namely, Zulfikri and Ghazali went *outing*. After his parents left the school hostel, he said that he went up to his dorm to have a bath. And at about 12.10pm, he went downstairs to eat the food which his parents brought with Syafiq (second appellant).

[90] After he had his lunch, he went to the mosque with Syafiq (second appellant) and waited for the Zohor prayers. After that, he went to the Ali Dorm and slept. He was awaken and was told to go to the Osman Dorm. He went there and there he saw for the very first time the victim who was lying on the bed being massaged by a few people. According to him, he was at the Osman Dorm for approximately two to three minutes only and there he heard that the victim fell in the bathroom. He also heard that the victim would be sent to the hospital.

[91] Farhan Faiz's (eighth appellant's) father by the name of Mohd Suhaimi bin Abdul Rashid (SD9) was called as a defence witness. In a nutshell, Suhaimi's (SD9's) evidence corroborated the story of Farhan Faiz (eighth appellant) by confirming that Suhaimi (SD9) and his wife visited their son at the school on that fateful day between 10.40am to 11.45am.

[92] Azhar bin Ibrahim (SD10) was the next witness called by the defence. He taught Arabic to the students of the same school. According to him, Ashraf (SP6) came to see him and asked as to what he should do when he give evidence in court. He said that he advised Ashraf (SP6) to tell the truth and to say what actually had happened. He testified that Ashraf (SP6) told him that he (Ashraf (SP6)) did not witness the incident. But Ashraf (SP6) did not elaborate further. According to Azhar bin Ibrahim (SD10), Ashraf (SP6) said that what he did was to protect the victim.

[93] Under cross-examination, Azhar bin Ibrahim (SD10) testified that Ashraf (SP6) met him one week before the school holidays – sometime in June 2004, at the corridor of the school, in front of the teacher's room. From his conversation with Ashraf (SP6) he understood that the latter did not witness the appellants killing the victim. However, he said that he did not know what Ashraf (SP6) had told the court.

[94] Again, under cross-examination, he testified that after Ashraf (SP6) had given his evidence in court, Ashraf (SP6) did not come to see him again. And that Ashraf (SP6) has since left the school.

[95] Under re-examination, Azhar bin Sulaiman (SD10) testified that on 22 July 2004 at 6pm, a lawyer visited him at the school. The lawyer told him that he has the right to give evidence in court. He named the lawyer as Encik Raja Badrol. However, he said that he did not tell the police nor did he tell the attorney general or any other lawyer for that matter because he did not know the procedure. He further testified that he did not tell the principal of the school about what Ashraf (SP6) had confided in him and he too did not tell the principal of the school that the lawyers had met him.

[96] The learned High Court judge in his written judgment considered at length the value of the evidence of Azhar bin Sulaiman (SD10) and he concluded that it was unsafe to accept the evidence of this witness and we entirely agree with him. This was what the learned High Court judge said (see pp 538–541 of the appeal record at *Jilid 1*):

> Kini saya beralih pula kepada keterangan SD10. Kemunculan saksi ini secara tiba-tiba tanpa sebarang petunjuk awal dan indikasi mengenai keujudannya menimbulkan beberapa persoalan. *'Poser'* ini timbul dan menjadi lebih ketara berikutan pengemukaan seorang lagi saksi pembelaan SD11 yang diketengahkan secara nyatanya bertujuan untuk menyokong keterangan SD10 ini. Namun sesuatu yang saya percaya di luar jangkaan peguambela telah berlaku di mana SD11 telah dipohon oleh pendakwaan untuk dicabar kebolehpercayaannya. Episod ini telah sedikit sebanyak menimbulkan tanda tanya berkaitan dengan motif sebenar dan kredibiliti SD10.

Semasa disoal balas oleh pendakwaan SD10 menyatakan bahawa dia telah tidak mengukuhkan apa yang diberitahu kepadanya oleh SP6 kepada pihak polis atau pihak berkenaan yang lain kerana tidak tahu prosidur. Ditanya pula sama ada dia telah memberitahu pengetuanya mengenai perkara tersebut, saksi ini mengakui bahawa dia telah tidak berbuat demikian. Saksi ini juga memberitahu Mahkamah bahawa dia juga tidak ada memberitahu Pengetuanya tentang kedatangan dan kehadiran peguambela tertuduh pertama di sekolah tersebut.

Sehubungan dengan pengakuan SD10 ini maka timbullah pula tanda tanya apakah yang menyebabkan saksi ini tidak pernah memberitahu dan berbincang dengan pengetuanya tentang maklumat sepenting ini sedangkan kejadian berkenaan telah hangat diperkatakan di seluruh negara. Sebagai seorang guru sudah pasti SD10 mengetahui akan implikasi apa yang diberitahu SP6 kepadanya.

Di samping mengambilkira perkara di atas mahkamah juga mengambil ingatan bahawa keterangan SD10 ini dikemukakan oleh pembelaan pada peringkat di mana pendakwaan telah tidak berpeluang untuk mengemukakan keterangan *'in rebuttal'* dari SP6 mengenai apa yang dinyatakan oleh SD10.

Di dalam keadaan sebegini mahkamah perlu menilai keterangan SD10 ini dengan berlatar belakangkan keterangan-keterangan lain. Sehubungan dengan ini, SP4 di dalam keterangannya secara jelas menyatakan bahawa SP6 ada bersamanya di koridor dom Osman semasa kejadian berlaku.

Selanjutnya meneliti keterangan yang diberikan SP6 mengenai kejadian di dom Osman, adalah didapati bahawa apa yang diberitahu kepada mahkamah adalah konsisten dengan keterangan saksi-saksi yang lain.

Berdasarkan perkara-perkara di atas maka adalah diputuskan bahawa testimoni SD10 bukanlah merupakan keterangan yang selamat untuk diterima.

[97] It is quite apparent that the learned High Court judge treated the evidence of Azhar bin Sulaiman (SD10) as a poser and it was more in the nature of an afterthought. There was no cross-examination of the prosecution's witnesses in regard to what Ashraf (SP6) purportedly said to Azhar bin Sulaiman (SD10). It goes without saying that the evidence of Azhar bin Sulaiman (SD10) is highly suspect and it goes against the weight of the evidence adduced by the prosecution before Azhar bin Sulaiman (SD10) took the stand to testify. We are constrained to hold that the evidence of Azhar bin Sulaiman (SD10) was nothing more than a mere concoction and must be rejected outright.

[98] It must be put on record that the evidence of Ashraf (SP6) was corroborated in material particulars by the other prosecution's witnesses. And corroboration need not be in whole, suffice that it may be in parts only. On corroboration, the High Court in *Public Prosecutor v Sarjeet Singh a/l Halban Singh & Anor* [1994] 2 MLJ 290 at pp 295–296 (HC); [1994] 3 CLJ 95 at p 97 had this to say:

Corroboration of an accomplice evidence need not mean independent corroboration to every factor of the case against the accused. It is sufficient, in my judgment, if the corroboration corroborates some material part of the accomplice's story which identifies the accused with the offence charged and goes towards the identity of the accused. Lord Reading CJ aptly said it in *Rex v Baskerville* [1916] 2 KB 658, especially at p 667 thus:

> We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it. The test applicable to determine the nature and extent of the corroboration is thus the same whether the case falls within the rule of practice at common law or within that class of offences for which corroboration is required by statute.

Further down the same page, Lord Reading CJ said:

> It would be in high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused.
>
> The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime.

[99] It goes without saying that corroborative evidence has to be independent of the witness it supports (*The King v Job Whitehead* [1929] 1 KB 99) and that it has to be credible in the context of the evidence as a whole (see *Director of Public Prosecutions v Kilbourne* [1973] AC 729 especially the speech of Lord Hailsham LC at p 746; and *Attorney-General of Hong Kong v Wong Muk Ping* [1987] 1 AC 501). And, of crucial importance, is the principle of law that the corroborative evidence must not only confirm the truthfulness of the witness it supports but it also implicate the accused in the alleged crime (*James v R* (1971) 55 Cr App R 299 (PC)). Corroboration may sometimes be provided by the accused himself like for instance when the accused is in the habit of telling manifest lies (*Regina v Lucas (Ruth)* [1981] QB 720).

[100] Here, the evidence of Ashraf (SP6) was amply corroborated by the other three main prosecution's witnesses as alluded to in the early part of this judgment.

[101] The defence also called Mohd Shazwan bin Burhanuddin (SD11) who testified that he spoke to Ashraf (SP6) and he asked Ashraf (SP6)

whether he (Ashraf (SP6)) saw what he has described. And Ashraf (SP6) replied that he was not satisfied with the boys from form five.

[102] Under cross-examination, Mohd Shazwan bin Burhanuddin (SD11) testified that he spoke to Ashraf (SP6) in regard to the case on the first day of the hearing at the High Court. He too testified that on that fateful day, he went past the Osman Dorm at about 10am and he saw about seven to eight people surrounded the victim. He said that he did not know what they were doing and that he could not identify them. Thereafter he went downstairs to attend classes until 11.45am to 12pm. He then went to the Abu Bakar Dorm but did not return to the Osman Dorm even though he stayed there.

[103] Later, after Zohor prayers Mohd Shazwan bin Burhanuddin (SD11) returned to the Osman Dorm and he saw a lot of people there. He also saw the victim on the bed and was surrounded by some people. He did not see Haziq (fifth appellant) there. However, he said that before the Asar prayers, he and the other students congregated at the Osman Dorm and there he agreed that Haziq (fifth appellant) did tell them that if the warden were to ask, they were supposed to say that the victim fell from the staircase.

[104] It was put to Mohd Shazwan bin Burhanuddin (SD11) that he saw Haikal (first appellant) kicked the victim twice, but he disagreed. He too did not agree that he saw Adam (sixth appellant) kicked the victim's back. He too disagreed that he was forced by Haikal (first appellant) to hit the victim. He then said that he had given a statement to the police.

[105] At this juncture, the prosecution sought to impeach the credit of Mohd Shazwan bin Burhanuddin (SD11). The learned High Court judge applied the correct procedure before coming to the conclusion that the impeachment was successful. In his written judgment at pp 541–542 of the appeal record at *Jilid 1*, the learned High Court judge had this to say and which we respectfully agree:

> Akhir sekali keterangan SD11
>
> Sepertimana yang dinyatakan terdahulu dari ini, mahkamah telah memutuskan ujudnya percanggahan material di dalam keterangan saksi ini dengan pernyataan di bawah s 112 Kanun Acara Jenayah yang dibuatnya di dalam penyiasatan polis.
>
> Setelah diminta oleh mahkamah ini untuk memberi penjelasan mengenai percanggahan material ini, saksi ini hanya mampu menyatakan bahawa dia terlupa mengenai apa yang dinyatakannya di dalam kenyataan kepada polis itu. Penjelasan sedemikian sewajarnya telah tidak dapat memuaskan hati mahkamah dan selanjutnya memutuskan bahawa kebolehpercayaan saksi ini telah dicabar. Selanjutnya setelah memutuskan sedemikian tidak ada lagi yang perlu dan dapat diperkatakan mengenai keterangan saksi ini.

[106] The learned High Court judge had considered everything that needs to be considered before making a ruling that the impeachment was well taken by the prosecution and accordingly impeached the credit of Mohd Shazwan bin Burhanuddin (SD11).

[107] The relevant provision in impeaching the credit of a witness is found in s 155 of the Evidence Act 1950 which enacts as follows:

> Impeaching credit of witness
>
> 155 The credit of a witness may be impeached in the following ways by the adverse party or, with the consent of the court, by the party who calls him:
>
> (a) by the evidence of persons who testify that they from their knowledge of the witness believe him to be unworthy of credit;
>
> (b) by proof that the witness has been bribed, or has accepted the offer of a bribe, or has received any other corrupt inducement to give his evidence;
>
> (c) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted;
>
> (d) (Repealed by Act A729).
>
> Explanation — A witness declaring another witness to be unworthy of credit may not, upon his examination-in-chief, give reasons for his belief, but he may be asked his reasons in cross-examination, and the answers which he gives shall not be contradicted, though, if they are false, he may afterwards be charged with giving false evidence.
>
> ILLUSTRATIONS
>
> (a) A sues B for the price of goods sold and delivered to B. C says that he delivered the goods to B.
>
> Evidence is offered to show that on a previous occasion he said that he had not delivered the goods to B.
>
> The evidence is admissible.
>
> (b) A is indicted for the murder of B.
>
> C says that B, when dying, declared that A had given B the wound of which he died.
>
> Evidence is offered to show that on a previous occasion C said that the wound was not given by A or in his presence.
>
> The evidence is admissible.

[108] Salleh Abas FJ speaking for the Federal Court in *Krishnan & Anor v Public Prosecutor* [1981] 2 MLJ 121 at pp 123–124; [1982] CLJ (Rep) 152 at p 157 explained the correct way to impeach the credit of a witness in these erudite terms:

One of the methods to impeach the credit of a witness is by proof of his former statement inconsistent with the evidence which is liable to be contradicted. This is enacted by s 155(c) of the Evidence Act, according to which impeachment essentially consists of two elements:

(a) contradicting the witness' evidence; ie confronting him with the inconsistent statement; and

(b) proof of the statement.

As regards contradicting, the second limb of s 145(1) of the Act requires the party who conducts the impeachment to draw the witness' attention to the inconsistent part of his statement, before confronting him with it. This rule is similar to the provision of s 5 of the Criminal Procedure Act 1865 of the United Kingdom; its intention being to give the witness an opportunity of either explaining away the inconsistent part of the statement or correcting his evidence so as to remove the inconsistency. If as a result of his explanation or correction, there is no more inconsistency, the matter ends there, otherwise the witness is liable to be contradicted. Thus as a first step it is essential that the court should be given the discretion to determine a preliminary question whether the witness' former statement is inconsistent with his evidence, otherwise much time will be wasted if it is found later that his former statement is not really irreconcilable with his evidence. We therefore think that it is a good procedure that a judge should be shown the statement as a first step in the impeachment procedure. Regarding proof of the former statement, this could be given by putting into the witness box the person, to whom the relevant statement was made or by whom it was recorded. The proof should show that the witness did make the relevant statement. In the case of an oral statement, evidence must be given what that statement was, but where the previous statement was written or reduced into writing, the writing itself should be produced. If the original writing is not available, with further proof as to its non-availability, a copy of the writing could be admitted. This is what happened in *Lim Ba Ba*'s case, where a carbon copy was admitted and the court held that this was perfectly in accordance with the law. In the case of a cautioned statement, the police officer recording it, in addition to giving evidence that he recorded the statement under caution has to go further and show that it was voluntarily made. Thus the procedure laid down in *Munusamy*'s case as applied to a cautioned statement only adds one more rule in that it requires the prosecution to show that the statement was voluntarily made. It must be remembered here that, lest we may be misunderstood, the proof of the inconsistent statement, whether under caution or not, under this procedure, does not constitute evidence of fact, but only evidence of inconsistency because of the contradiction of the evidence of the witness with his former statement. In other words the former statement is not replacing his evidence which has been contradicted, but only renders his evidence completely untrustworthy.

[109] And the learned High Court judge has done just that.

ANALYSIS

[110] Raja Azlan Shah FJ (as His Majesty then was) made an apt

distinction between the provisions of s 299 of the Penal Code and s 300 of the Penal Code in the case of *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174 (FC), and this was what His Majesty said at pp 176–177 of the report:

> Section 299 of the Penal Code enacts that a person commits culpable homicide, if the act by which the death is caused is done: (a) with the intention to cause death; (b) with the intention of causing such bodily injury as is likely to cause death; (c) with the knowledge that … the act is likely to cause death.
>
> Section 300 of the Penal Code defines murder as follows. Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done: (1) with the intention of causing death; (2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; (3) with the intention of causing such bodily injury to any person, and … is sufficient in the ordinary course of nature to cause death; (4) with the knowledge that the act is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death.
>
> The words which I have italised show the marked differences between the two offences. Where there is an intention to kill, as in (a) and (1), the offence is always murder. Where there is no intention to cause death or bodily injury, then (c) and (4) apply. Whether the offence is culpable homicide or murder depends upon the degree of risk to human life. If death is a likely result, it is culpable homicide; if it is the most probable result, it is murder. Illustration (d) of s 300 of the Penal Code is a case of this description. Where the offender knows that the particular person injured is likely, either from peculiarity of constitution, immature age, or other special circumstances, to be killed by an injury which would not ordinarily cause death, it is murder. Illustration (b) of s 300 of the Penal Code is a good example. The essence of (b) and (3) is this. It is culpable homicide if the body injury intended to be inflicted is likely to cause death; it is murder, if such injury is sufficient in the ordinary course of nature to cause death. Illustration (c) given in s 300 of the Penal Code is an example. It is on a comparison of these two limbs of s 299 and s 300 that the decision of doubtful cases as the present must generally depend. The distinction is fine, but noticeable. In the last analysis, it is a question of degree of probability.
>
> A comparison that frequently arises in the application of ss 299 and 300 is the tenuous contention that s 299 is not a substantive offence and therefore an offence is either murder or culpable homicide according to whether or not one of the exceptions to s 300 apply, and if by reason of the absence of the necessary degree of mens rea an offence does not fall within s 300, it cannot be one of culpable homicide not amounting to murder punishable under s 304 of the Penal Code, but would amount to causing grievous hurt. In our view, the correct approach to the application of the two sections is this. Section 299 clearly defines the offence of culpable homicide. Culpable homicide may not amount to murder (a) where the evidence is sufficient to constitute murder, but one or more of the exceptions to s 300 of the Penal Code apply, and (b) where the necessary degree of mens rea specified in s 299 is present, but not the special degrees of mens rea referred to in

s 300 of the Penal Code. We would like in this connection to express the need to bear in mind that all cases falling within s 300 of the Penal Code must necessarily fall within s 299, but all cases falling within s 299 do not necessarily fall within s 300. The first part of s 304 of the Penal Code covers cases which by reason of the exceptions are taken out of the purview of s 300, cll (1), (2) and (3) but otherwise would fall within it and also cases which fall within the second part of s 299, but not within s 300, cll (2) and (3). The second part of s 304 of the Penal Code covers cases falling within the third part of s 299 not falling within s 300, cl (4).

[111] In short, all cases falling within the ambit of s 300 of the Penal Code must necessarily fall within s 299 of the Penal Code, but all cases within the purview of s 299 of the Penal Code do not necessarily fall within s 300 of the Penal Code.

[112] Section 300 of the Penal Code enacts as follows:

Murder

300 Except in the cases hereinafter excepted, culpable homicide is murder —

(a) if the act by which the death is caused is done with the intention of causing death;

(b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;

(c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or

(d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

[113] And the special exceptions to s 300 of the Penal Code are irrelevant to this appeal.

[114] Intention is purely a matter of inference. It is also salutary to mention that intention could have been developed on the spot (*Ismail bin Hussin v Public Prosecutor* [1953] MLJ 48). It is also difficult if not impossible to procure direct evidence to prove the intention of an individual (*Lee Fah Sang v Public Prosecutor* [1967] 2 MLJ 163; *Lim Heng Soon & Anor v Public Prosecutor* [1970] 1 MLJ 166; *Lai Kim Hon & Ors v Public Prosecutor* [1981]

A 1 MLJ 84; *Dato Mokhtar bin Hashim & Anor v Public Prosecutor*; and *Khoo Hi Chiang v Public Prosecutor and another appeal* [1994] 1 MLJ 265).

[115] Where the intention to kill is present, the act amounts to murder. But where such an intention is absent, the act amounts to culpable homicide B not amounting to murder. In order to determine the intention of the offender, each case must be decided on its own merits. No two cases are alike. The law looks at the natural result of a man's act in order to ascertain his intention. The number of blows delivered, the nature of those blows and the parts of the body on which those blows have been inflicted are all relevant C considerations to determine the intention to kill.

[116] Intention too can be inferred from the act or conduct of the assailant and by looking at the other relevant circumstances of the case (*Juraimi bin Husin v Public Prosecutor, Mohd Affandi bin Abdul Rahman & Anor v Public* D *Prosecutor* [1998] 1 MLJ 537). Of significance is this. That an intention to kill can be inferred from the nature of the injuries sustained by the deceased (*Sainal Abidin bin Mading v Public Prosecutor* [1999] 4 MLJ 497 (CA)).

E **[117]** From the available evidence, the necessary ingredients to constitute murder are as follows:

(a) that the victim by the name of Muhamad Farid bin Ibrahim NRIC No: 881211-56-5435 died on 28 March 2004 between the hours of 10.30am to 4.30pm at Dom Osman, Tingkat 2, Asrama Putra, Sekolah F Menengah Agama Dato' Klana Petra Maamor, Ampangan, in the district of Seremban, in the State of Negeri Sembilan;

(b) that the victim died from injuries caused by all the eight (8) appellants;

(c) that all the eight (8) appellants had caused the injuries with the G intention of committing murder pursuant to s 300 of the Penal Code; and

(d) that all the eight (8) appellants caused the injuries at an unlawful assembly in pursuance of a common object as envisaged in s 149 of the H Penal Code.

[118] There were four eye-witnesses who witnessed the whole episode. They testified as to the roles played by all the eight appellants. The injuries sustained by the victim corroborated the accounts narrated by the four I eye-witnesses. According to the case of *Ravji Alias Ram Chandra v State of Rajasthan* [1996] 2 SCC 175 when the evidence of eye-witnesses testified as to the injuries sustained by the deceased and was corroborated by medical evidence, the conviction for murder was upheld. And in the case of *Dayaram and another v State of Madhya Pradesh, thr PS Dhangaon* [1992] 3 Cri LJ

3154, the court held that when eye-witnesses evidence is corroborated by medical evidence and the specific injury was attributed to the accused, the accused's participation was said to be established.

[119] There were twenty four (24) external injuries on the victim and they were all attributable to the eight appellants. The internal injuries suffered by the victim centred principally on the victim's head. All these injuries were sufficient in the ordinary course of nature to cause death and, in such a situation according to the case of *Kamta Prasad v State of Uttar Pradesh* AIR 1994 SC 1519, the acts of the eight appellants would fall within the ambit of s 302 of the Penal Code and not s 304 of the Penal Code.

[120] We hold that the injuries found on the victim were intentionally inflicted and were sufficient in the ordinary course of nature to cause the death of the victim based on the evidence of the good doctor (*Ram Swaroop v State of Rajasthan* [1994] Cri LJ 596). According to the case of *Ramkishore Patel and others v State of Madhya Pradesh* [1997] 1 Cri LJ 207; [1994] 2 EFR 186 (SC) where the injuries inflicted were fatal, just like the present appeal, the intention to inflict those injuries must be to cause the death of the victim. And such an intention can be assumed.

[121] The number of blows which the victim received from the eight appellants cannot be viewed in isolation from the nature of those blows. The parts of the body on which those blows landed were concentrated on the head of the victim. It must be recalled that the victim was unconscious and the striking of further blows, even on his body, although such blows might not ordinarily be dangerous would certainly indicate an intention on the part of the eight appellants to cause the victim more injury than would be caused by an ordinary beating. No one in the position of the victim would be able to survive when further blows were given. And according to the case of *Ram Lal and others v King Emperor* [1945] 46 Cr LJ 728, the shock to one's system would be aggravated by the additional blows. Such was the predicament of the victim which ultimately led to his death. According to the good doctor at p 206 of the appeal record at *Jilid 1*:

> Kematian adalah akibat disebabkan kecederaan di kepala dan abdomen akibat terkena benda tumpul.

[122] The merciless attack on the victim by the eight (8) appellants, practically killed the victim on the spot. The victim did not even retaliate. He was outnumbered and he had no chance at all.

[123] What the eight appellants did to the victim should be highlighted in order to appreciate the gravity of the offences which they committed. For this

exercise, the following facts would suffice:

(a) *Haikal (first appellant)*

Hazwan (SP8) saw Haikal (first appellant) *bear hugged* the victim and dropped the victim backwards. Hazwan (SP8) saw the victim fell flat backwards (*jatuh terlentang*) and the victim's head hit the cement floor. And from the cautioned statement of Haziq (fifth appellant), it was revealed that Haikal (first appellant) had pushed the victim till the victim fell backwards (*jatuh terlentang*) and the victim's head hit the floor.

(b) *Syafiq (second appellant)*

Ashraf (SP6) saw Syafiq (second appellant) kicked the victim's abdomen when the victim was still standing. Ashraf (SP6) could not ascertain how many times the victim was kicked on the abdomen by Syafiq (second appellant) but he was certain that it was done by Syafiq (second appellant).

(c) *Mohamad Afif (third appellant)*

Afiq (SP4), Ashraf (SP6) and Hazwan (SP8) saw Mohamad Afif (third appellant) pounded the victim's back part of the head with a red pail. And from the cautioned statement of Haziq (fifth appellant), it was revealed that Mohamad Afif (third appellant) had used the red pail to hit the victim's head.

(d) *Firdaus (fourth appellant)*

Hazwan (SP8) saw Firdaus (fourth appellant) stepped on the victim's head when the victim was lying flat on his abdomen on the floor. This was also corroborated by the evidence of Firdaus Azmy (SP3) who also saw Firdaus (fourth appellant) stepping on the victim's head.

(e) *Haziq (fifth appellant)*

In his cautioned statement, Haziq (fifth appellant) admitted slapping the victim's face.

(f) *Adam (sixth appellant)*

Firdaus Azmy (SP3) saw Adam (sixth appellant) kicked the victim's abdomen until the victim fell on the cement floor on the victim's back. Afiq (SP4) also saw Adam (sixth appellant) kicked the victim's back using a football boot causing the victim to fall flat on his abdomen on the cement floor. Ashraf (SP6) saw Adam (sixth appellant) gave a *flying kick* to the back of the victim. And, finally, Hazwan (SP8) saw Adam (sixth appellant) kicked the victim's back.

(g) *Rasyidan (seventh appellant)*
Ashraf (SP6) saw Rasyidan (seventh appellant) pounded hard (menghentak) the victim's head twice against the locker. This was also corroborated by the evidence of Afiq (SP4).

(h) *Farhan Faiz (eighth appellant)*
Ashraf (SP6) saw Farhan Faiz (eighth appellant) kicked the victim's back while the victim was still standing.

[124] Looking at the injuries and the concerted blows on the victim by all the appellants, we are of the view that it is relatively easy to infer the intent to kill. Indeed, the more severe the wounds and the more numerous they are, the more likely it is that intent will be inferred.

[125] The word *intention* is not defined in the Penal Code. It is up to the court to define it. Thus, the word *intention* in *Faqira v State* AIR 1955 Allahabad 321 at 325 was defined as '*a conscious state in which mental faculties are roused into activity and summoned into action for the deliberate purpose of being directed towards a particular and specified end which the human mind conceives and perceives before itself*.'

[126] Again, the word '*intention*' under the Indian Penal Code has been defined to mean '*a purposeful doing of a thing to achieve a particular end*' (*Ram Kumar v State of Rajasthan* AIR 1970 Vol 57 Raj 60 at p 63; and *Sanku Sreedharan Kottukallil Veettil Konathadi Kara v State of Kerala* AIR 1970 Vol 57 Ker 98 at p 103).

[127] The Singapore High Court in *Sim Yew Thong v Ng Loy Nam Thomas and other appeals* [2000] 4 SLR 193, at p 194 defined '*intention*' in this way:

> Intention, being purely an operation of the mind, can only be proved by drawing inferences from the surrounding circumstances and the acts of the person ... A person is said to intend the natural consequences of his act, …

[128] It is ideal to state that motive is not essential to prove intention (*The State v Gurcharan Singh* AIR 1952 39 Punjab 89; and *Jai Prakash v State (Delhi Administration)* [1991] 2 SCC 32 at p 39). Here, however, the initial refusal to lend the electric kettle and the lending of the electric kettle grudgingly by the victim at a later stage accompanied by the remarks of, *Abang form 5 tak nak tidur ke*? by the victim, ignited the attacks on the victim by the appellants.

[129] The word '*intention*' requires something more than the mere foresight of the consequences. In fact, it is the purposeful doing of a thing in

order to achieve a particular end. The *Concise Oxford English Dictionary,* (11th Ed), revised and edited by Catherine Soanes and Angus Stevenson at p 739 defines the word '*intention*' as:

> an aim or plan, the action or fact of intending, conceptions formed by directing the mind towards an object.

[130] Here, the appellants directed their minds to the victim as their 'object'.

[131] At the end of the day, the objective facts pertaining to the behaviour of the appellants are important considerations to be taken into account in determining the right inferences to be drawn. Kirby ACJ in *David Colin Winner* [1995] 79 A Crim R 528 at p 542 aptly said:

> Because it is impossible for any court, judge or jury, to actually enter the mind of an accused person and search for his or her intent at the critical time, it is inescapable that the forensic process by which intent is judged … will address the objective facts from which an inference of intention may be derived. This is why it is often said that a person's acts may provide the most convincing evidence of intention. In *Richard III*, Shakespeare suggested that it is by acts that the observer straightway shall know the heart. So it is by acts that a court straightway may know the solution to the riddle of intention required by the criminal law. If it were otherwise intention, absent acknowledgment or reliable confession, could scarcely ever be proved.

[132] We have perused through the written judgment of the learned High Court judge and we could not find anything wanting. He made a correct judicial appreciation of the evidence and, in particular, he considered the evidence of the witnesses essential to the unfolding of the narrative that were called by the prosecution. He too considered meticulously the defence of the appellants in its correct perspective. The learned High Court judge correctly assessed the appellants' defences as '*stereotype*' and in his written judgment he had this to say and which we respectfully agree (see pp 537–538 of the appeal record at *Jilid 1*):

> Menilai semua keterangan bela diri tertuduh-tertuduh secara keseluruhan adalah dipertikaikan bahawa pembelaan yang diajukan bersifat '*stereotype*'. Kesemua saksi memberitahu Mahkamah bahawa mereka datang ke dom Osman dan melihat mangsa terbaring di atas lantai ataupun di atas katil di dalam keadaan tidak sedarkan diri.
>
> Ada di antara mereka walaupun melihat keadaan mangsa terlentang di atas lantai tidak sedar diri, namun tiada sebarang reaksi dari mereka. JKT3 contohnya, di dalam keterangan menyatakan dia tidak ada membuat pertanyaan tentang apa yang berlaku ke atas mangsa. Tumpuannya ketika itu ialah terhadap baldinya yang

telah pecah. Sikap sedemikian adalah bertentangan dengan naluri dan sifat semulajadi manusia, dan teramat sukar untuk dipercayai.

Sikap tak kisah dan tak ingin tahu tentang apa yang berlaku dan dilihat juga dipaparkan oleh tertuduh-tertuduh di dalam keterangan masing-masing. Apa yang digambarkan melalui keterangan tertuduh-tertuduh ialah seolah-olah kejadian-kejadian ke atas mangsa tersebut adalah merupakan perkara biasa yang tidak perlu diberi perhatian. Keterangan mengenai sikap sedemikian oleh tertuduh-tertuduh adalah tidak munasabah dan tidak dapat diterima kebenarannya. Keterangan tertuduh-tertuduh mengenai aspek ini telah menjejaskan kebolehpercayaan mereka secara serious dan menyeluruh.

[133] From pp 463–497 of the appeal record at *Jilid 1*, the learned High Court judge examined the evidence with a fine toothcomb and, at the close of the case for the prosecution, he found that the prosecution had made out a prima facie case against all the appellants as per the charge.

[134] Section 180 of the Criminal Procedure Code is the relevant section to consider. It enacts as follows:

Procedure after conclusion of case for prosecution

180

(1) When the case for the prosecution is concluded, the court shall consider whether the prosecution has made out a prima facie case against the accused.

(2) If the court finds that the prosecution has not made out a prima facie case against the accused, the court shall record an order of acquittal.

(3) If the court finds that a prima facie case has been made out against the accused on the offence charged the court shall call upon the accused to enter on his defence.

(4) For the purpose of this section, a prima facie case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction.

[135] Sub-section (4) of s 180 of the Criminal Procedure Code sets out the meaning to the all important phrase of 'a prima facie case'. It talks about 'credible evidence' that the prosecution has adduced to prove each ingredient of the offence which if unrebutted or unexplained would warrant a conviction but it does not explain what is 'credible evidence'.

[136] Vincent Ng J (now JCA) in *Public Prosecutor v Ong Cheng Heong* [1998] 6 MLJ 678 said that 'credible evidence' is evidence which has been filtered and which has gone through a process of evaluation.

[137] Augustine Paul JCA (now FCJ) in *Balachandran v Public Prosecutor* [2005] 2 MLJ 301, a Federal Court case, had this to say of the phrase '*a prima facie case*' (see p 315 of the report):

> A prima facie case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can be overthrown only by evidence in rebuttal.

[138] And at p 316 of the same case, Augustine Paul JCA (now FCJ) spoke of the test to determine what is prima facie:

> The test at the close of the case for the prosecution would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative then a prima facie case has been made out. This must, as of necessity, require a consideration of the existence of any reasonable doubt in the case for the prosecution. If there is any such doubt there can be no prima facie case.

[139] Gopal Sri Ram JCA (now FCJ) speaking for this court in *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65, had this to say of what a judge should do when sitting alone in the context of s 180 of the Criminal Procedure Code. This was what His Lordship said at p 104:

> It therefore follows that there is only one exercise that a Judge sitting alone under s 180 of the Code has to undertake at the close of the prosecution case. He must subject the prosecution evidence to maximum evaluation and ask himself the question: If I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative then no prima facie case has been made out and the accused would be entitled to an acquittal.

[140] To paraphrase these two authorities, the law may be stated in this way. At the close of the prosecution's case, the trial judge must scrutinise the evidence adduced by the prosecution on a maximum evaluation basis — the required standard, and then to ask himself one very pertinent question: Can I convict him if he elects to remain silent after the defence has been called based entirely on the evidence led by the prosecution? If the answer is in the positive, a prima facie case has been made out and the accused has to be convicted. If the answer is in the negative, then no prima facie case has been made out and the accused is entitled to be acquitted.

[141] We are satisfied that the learned High Court judge has embarked on a maximum evaluation of the evidence led by the prosecution before he decided that there was a prima facie case against all the appellants as per the charge.

[142] The learned High Court judge also conducted a voire dire when Haziq's (fifth appellant's) cautioned statement was sought to be introduced by the prosecution. He held after the voire dire that the cautioned statement was given voluntarily without any inducement, threat or promise. Mohd Noor Ahmad FCJ (as he then was) writing for the Federal Court in the case of *Tan Ewe Huat v Public Prosecutor* [2004] 1 MLJ 559; [2004] 1 CLJ 521 had this to say (see p 530 of the report):

> It is trite law that there is no burden on an accused to prove that the statement recorded from him is involuntary. The burden lies on the prosecution to show positively that the statement was voluntarily given. There is also no burden on the accused to raise a reasonable doubt as to the voluntariness of a cautioned statement. The only burden on the accused is to show suspicious circumstances surrounding the making of, or recording of, the cautioned statement.

[143] Gopal Sri Ram JCA (now FCJ) in *Chan Ming Cheng v Public Prosecutor* [2002] 3 MLJ 733 at p 740; [2002] 4 CLJ 77 at p 82, spoke of the burden on the part of the accused to dislodge the voluntariness of the cautioned statement:

> There is no burden on an accused to prove that the statement recorded from him is involuntary. The burden lies on the prosecution to show positively that the statement was voluntarily given. There is also no burden on an accused to raise a reasonable doubt as to the voluntariness of a cautioned statement. The only burden on an accused is to show suspicious circumstances surrounding the making of or recording of the cautioned statement. So long as the suspicion is reasonable as to the voluntariness of the statement, it is incumbent on the trial judge to hold it inadmissible.

[144] Now, at the end of the trial within the trial, the learned High Court judge ruled that the cautioned statement was made voluntarily without any inducement, threat or promise. In its original text, this was what the learned High Court judge said (see p 478 of the appeal record at *Jilid 1*):

> Hasil dari '*voir dire*' ini mahkamah telah memutuskan bahawa JKT5 telah memberi percakapannya secara sukarela, bebas dari elemen paksaan, pujukan, rayuan dan dorongan. Justeru itu rakaman percakapan tersebut telah diterima masuk sebagai keterangan di dalam perbicaraan ini dan ditandakan sebagai P23.

[145] The ruling meant that the cautioned statement of Haziq (fifth

appellant) formed part of the prosecution's case. It was argued that the learned High Court judge must give more reasons than what he had given. It is appropriate, at this juncture, to refer to the case of *Public Prosecutor v Muhamad Nasir bin Shaharuddin & Anor* [1994] 2 MLJ 576, at p 584 where Visu Sinnadurai J (as he then was) aptly said:

> Whether the safeguards embodied in s 37A of the DDA had been complied with cannot be determined by a mere analysis of each facet of the process of recording the statement. Section 37A, like s 113 of the Criminal Procedure Code (FMS Cap 6) ('the CPC') serves two purposes: (i) to assist the prosecution in establishing its case against the accused; and (ii) to protect the accused against the admission of incriminating statements made by him, falsely induced by hope or fear. The whole process has to be considered by the court in its totality, bearing in mind that so long as the arrested person was aware and fully understood the implications and the consequences of making the statement, it should be admissible.
>
> Whether the arrested person did or did not understand the implications and consequences of making the statements, depends on the facts of each case. It is therefore a question of fact which each court has to decide. In this regard, precedents whilst being useful in providing guidance, cannot be strictly adhered to. The ultimate test is whether the statement sought to be admitted 'appears to the court' to be voluntarily made. Generally, voluntariness is an accepted term used to indicate that the statement made by the accused was at the free will of the arrested person.

[146] That would sufficiently put to an end the criticism levelled against the learned High Court judge's treatment of the way the cautioned statement should be received as evidence.

[147] There were discrepancies in the evidence of the prosecution's witnesses but these discrepancies were minor and insignificant. Indeed the learned High Court judge addressed his mind to these minor discrepancies in his written judgment in these words (see pp 483–484 of the appeal record at *Jilid 1*):

> Keujudan discrepansi yang dikatakan terdapat di dalam keterangan saksi-saksi ini adalah merupakan perbezaan kecil yang lazim dan seharusnya ada apabila dua orang atau lebih memperihalkan sesuatu kejadian yang berlaku di masa yang agak lampau. Namun demikian discrepansi-discrepansi yang disebutkan di dalam hujahan mereka tidak langsung menimbulkan sebarang kecacatan atau kekurangan terhadap keterangan pihak pendakwaan.

[148] No two persons can describe the same thing in the same way. It is not surprising that differences in observation by two persons may be construed as discrepancies. In reality, it is a difference in terms of recollection and narration. Towards this end, what Raja Azlan Shah FJ (as His Majesty then

was) said in *Public Prosecutor v Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15 at p 19 is quite apt. There His Majesty said:

> In my opinion discrepancies there will always be, because in the circumstances in which the events happened, every witness does not remember the same thing and he does not remember accurately every single thing that happened. It may be open to criticism, or it might be better if they took down a notebook and wrote down every single thing that happened and every single thing that was said. But they did not know that they are going to be witnesses at this trial. I shall be almost inclined to think that if there are no discrepancies, it might be suggested that they have concocted their accounts of what had happened or what had been said because their versions are too consistent. The question is whether the existence of certain discrepancies is sufficient to destroy their credibility. There is no rule of law that the testimony of a witness must either be believed in its entirety or not at all. A court is fully competent, for good and cogent reasons, to accept one part of the testimony of a witness and to reject the other. It is therefore, necessary to scrutinise each evidence very carefully as this involves the question of weight to be given to certain evidence in particular circumstances.

[149] The learned High Court judge has scrutinised the evidence in such a way that it is beyond reproach. He has marshalled the facts garnerned from the prosecution's witnesses' versions of the incident and concluded that the discrepancies were minor. We find no fault in this approach.

[150] We agree with the learned High Court judge that there was overwhelming evidence from Firdaus Azmy (SP3), Afiq (SP4), Ashraf (SP6) and Hazwan (SP8) about the roles played by each of the eight (8) appellants which if unrebutted or unexplained would warrant a conviction under s 302 of the Penal Code read with s 149 of the same Code. It must be borne in mind that these four prosecution witnesses knew and recognised all the eight appellants. There was no necessity to hold an identification parade. The four prosecution witnesses are familiar with all the eight appellants not through personal acquaintances but rather they have seen each other within the school. All of them were students of the same school albeit from different classes. It is a residential school where they lived and studied together under one roof but from different classes.

[151] It is now opportune to say something about s 149 of the Penal Code. That section enacts as follows:

> Every member of an unlawful assembly to be deemed guilty of any offence committed in prosecution of common object
>
> 149 If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.

[152] The definition of unlawful assembly is set out in s 141 of the Penal Code. It enacts as follows:

> Unlawful assembly
>
> 141 An assembly of five or more persons is designated an 'unlawful assembly', if the common object of the persons composing that assembly is —
>
> (a) to overawe by criminal force, or show of criminal force, the Legislative or Executive Government of Malaysia or any State, or any public servant in the exercise of the lawful power of such public servant;
>
> (b) to resist the execution of any law, or of any legal process;
>
> (c) to commit any mischief or criminal trespass, or other offence;
>
> (d) by means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or
>
> (e) by means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.
>
> Explanation — An assembly which was not unlawful when it assembled may subsequently become an unlawful assembly.

[153] Section 149 of the Penal Code talks about the 'common object' of the assembly as opposed to the 'common intention' of several persons. Section 34 of the Penal Code says that when a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone. Now, although s 34 of the Penal Code does not like s 149 of the Penal Code create a specific offence, both sections have something in common and that is that each prescribes conditions in which a person may be convicted for something that is constituted a substantive offence by the other provisions of the Code. A classic example is as follows. Where the offence in question is murder in contravention of s 302 of the Penal Code, s 34 of the same Code provides that if its conditions are fulfilled then each of the person who has fulfilled them is liable for the murder as if he had committed it alone. And, s 149 of the same Code provides that if its conditions are fulfilled then any person who fulfils them is by reason of it is guilty of the offence of murder.

[154] We have said that s 34 of the Penal Code uses the expression

'common intention' and s 149 of the same Code uses the expression 'common object' and these expressions may or may not mean different things according to the facts of the case.

[155] The Supreme Court in *Lalji and others v State of UP* AIR 1989 SC 754 explained the principle of s 149 of the Penal Code in this way:

> Section 149 makes every member of an unlawful assembly at the time of committing of the offence guilty of that offence. The section creates a constructive or vicarious liability of the members of the unlawful assembly for the unlawful acts committed pursuant to the common object by any other member of that assembly. However, the vicarious liability of the members of the unlawful assembly extends only to the acts done in pursuance of the common object of the unlawful assembly, or to such offences as the members of the unlawful assembly knew to be likely to be committed in prosecution of that object. Once the case of a person falls within the ingredients of the section the question that he did nothing with his own hands would be immaterial. He cannot put forward the defence that he did not with his own hands commit the offence committed in prosecution of the common object of the unlawful assembly or such as the members of the assembly knew to be likely to be committed in prosecution of that object. The basis of the constructive guilt under s 149 is mere membership of the unlawful assembly, with the requisite common object or knowledge. Thus, once the court holds that certain accused persons formed an unlawful assembly and an offence is committed by any member of that assembly in prosecution of the common object of that assembly, or such as the members of the assembly knew to be likely to be committed in prosecution of that object, every person who at the time of committing of that offence was a member of the same assembly is to be held guilty of that offence. After such a finding it would not be open to the court to see as to who actually did the offensive act or require the prosecution to prove which of the members did which of the offensive acts. The prosecution would have no obligation to prove it. In other words it is not open to the court to acquit members of the unlawful assembly for lack of corroboration as to their participation.

[156] In *Sukha and others v State of Rajasthan* AIR 1956 SC 513 at p 518, the Supreme Court of India held that:

> a common object is different from a common intention in that it does not require prior concert and a common meeting of minds before the attack, and an unlawful object can develop after the people get there.

Gour's 'Penal Law of India' (7th Ed) at p 710 states as follows:

> The purpose for which the members of the assembly set out or which they desired to achieve is the object. Each member may have an object in view and may also have his own idea of the means with which that object is to be achieved and the extent to which he is prepared to go for attaining it. If the object desired by all the members is the same, the knowledge that that is the object which is being pursued

A is shared by all the members and they are in general agreement as to how it is to be achieved; the object then becomes the common object of the assembly. Normally, a determination to achieve an object includes a resolve to meet with force any resistance to its attainment. A common object may be found by express agreement after mutual consultations but that is not necessary. It may be formed at any stage by all or some members of the assembly and the other members may join and accept it. It may be modified or altered or abandoned at any stage. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined by keeping in view the nature of the assembly, the arms it carries and the behavior of its members at or near the scene of the incident.

[157] The Singapore Court of Appeal in *Chandran & Ors v Public Prosecutor* [1992] 2 SLR 265 said at pp 269–270:

> Section 149 does not require proof of a pre-arranged plan and a common intention which a prosecution involving s 34 of the Code would require. The 'common object' under s 149 of the Code must not be confused with the 'common intention' under s 34 of the Code. Though they both deal with what may be called 'constructive liability' for crime, it is important to see the distinction and the way both sections operate.
>
> In *Barendra Kumar Ghosh v Emperor* AIR 1925 PC 1, Lord Sumner, at p 7 said:
>
> > There is a difference between object and intention; for though their object is common, the intentions of several members may differ and indeed may be similar only in the respect that they are all unlawful while the element of participation in action which is the leading feature of s 34, is replaced in s 149, by membership of the assembly at the time of the committing of the offence. Both sections deal with combinations of persons, who become punishable as sharers in an offence.

[158] To paraphrase all these salient authorities, it is correct to say that in the case of an unlawful assembly, certain members of that assembly may have in addition to the common object which they share with its other members private intentions of their own which they only know and which have the quality of being unlawful in common with the common object. And there may well be circumstances in which 'object' and 'intention' are the same where the parties act to achieve a particular result.

[159] The statement of the law in *Gour's 'Penal Law of India'* (7th Ed) at p 710 as reproduced earlier has put to rest and has answered the question of whether all members of the said unlawful assembly must be present at all times in order to qualify the usage of s 149 of the Penal Code. The answer is in the negative in that the members may change because of the words, '*It may be formed at any stage by all or some members of the assembly and the other members may join and accept it*'.

[160] As much as the 'common object' may change, so does the attendance of '*membership*' of the unlawful assembly. Thus, there is no necessity to have a total of five or more persons at any one time, so long as the total number of the unlawful assembly over the whole duration constitutes five or more that would be sufficient to attract s 149 of the Penal Code.

[161] Accordingly, we hold that what all the appellants did, as per the evidence, are actions that reflect a 'common object'. This would be the finding of this court.

[162] The charge that appears in the beginning of this judgment was the original charge which was marked as 'P2'. An amended charge was introduced at the commencement of the trial and it was later marked as 'P2(a)' and it is worded as follows:

> Bahawa kamu pada 28 March 2004 jam di antara 10.30 pagi hingga 4.15 petang di Dom Osman, Tingkat 2, Asrama Putra, Sekolah Menengah Agama Dato' Klana Petra Maamor, Ampangan, di dalam daerah Seremban, di dalam negeri, Negeri Sembilan, sebagai ahli satu perhimpunan haram dengan tujuan bersama untuk mendatangkan kecederaan kepada MUHAMAD FARID BIN IBRAHIM (KPT 881211-56-5435) dan sebagai ahli perhimpunan tersebut dalam meneruskan tujuan bersama kamu, seorang atau lebih dari kamu telah melakukan pembunuhan dengan menyebabkan kematian ke atas MUHAMAD FARID BIN IBRAHIM (KPT 881211-56-5435), oleh yang demikian, kamu telah melakukan kesalahan menurut seksyen 149 Kanun Keseksaan yang boleh dihukum di bawah seksyen 302 Kanun yang sama.

[163] Before the commencement of the trial proper, the amended charge was tendered and marked as 'P2(a)'.

[164] The appellants contended that they were prejudiced when the learned High Court judge reproduced the original charge in 'P2' and as set out in the beginning of this judgment in the learned High Court judge's written judgment.

[165] It must be observed that the original charge in 'P2' and the amended charge in 'P2(a)' made references to s 302 of the Penal Code and s 149 of the same Code. The same ingredients are required for the original charge in 'P2' and the amended charge in 'P2(a)'. We find that it has not occasioned a failure of justice. We also find that it has not prejudiced the appellants because they knew what they were up against and their defences showed just that. There was sufficient evidence to justify the decision arrived at by the learned High Court judge.

[166] We are of the view that in such a situation, the provisions of s 422

of the Criminal Procedure Code and s 167 of the Evidence Act 1950 would save the day. For convenience, we now re-produce these two provisions. Section 422 of the Criminal Procedure Code enacts as follows:

> Irregularities not to vitiate proceedings
>
> 422 Subject to the provisions contained in this chapter no finding, sentence or order passed or made by a court of competent jurisdiction shall be reversed or altered on account of —
>
> (a) any error, omission or irregularity in the complaint, sanction, consent, summons, warrant, charge, judgment or other proceedings before or during trial, or in any inquiry or other proceedings under this code;
>
> (b) the want of any sanction; or
>
> (c) the improper admission or rejection of any evidence,
>
> unless such error, omission, irregularity, want, or improper admission or rejection of evidence has occasioned a failure of justice.

[167] And s 167 of the Evidence Act 1950 enacts as follows:

> No new trial for improper admission or rejection of evidence
>
> 167 The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case if it appears to the court before which the objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.

[168] We can do no better than to refer to the case of *Public Prosecutor v Sa'ari Jusoh* [2007] 2 CLJ 197, a decision of the Federal Court. There, writing a separate judgment, Augustine Paul FCJ had this to say at p 222:

> It follows that a verdict can be founded on a basis not indicated by the prosecution in its opening address. But it must be done in such a way so as not to place the accused at a tactical disadvantage with resultant unfairness to him.

[169] Continuing at pp 223–224, His Lordship had this to say:

> In commenting on s 465 of the Indian Criminal Procedure Code which is similar to s 422 of the Code *Sarkar on Criminal Procedure* (7th Ed) says at p 1367:
>
> > This is the residuary section in the chapter intended to cure any error, omission or irregularity committed by a court of competent jurisdiction in the courts (sic) of a trial through accident or inadvertence, or even an illegality consisting in the

> infraction of any mandatory provision of law, unless such irregularity or illegality has in fact occasioned a failure of justice. The object of the section is to secure justice by preventing the invalidation of a trial already held, on the ground of technical breaches of any provisions in the Code causing no prejudice to the accused. The intention is to eliminate all possibilities of acquittal of persons committing offences except on the merits.

The prejudice that may be caused to the accused as a result of a different course being adopted to secure a conviction may be obviated by several methods. Where the evidence adduced discloses an offence other than the subject matter of the original charge and the opening address the charge may be amended accordingly on the authority of s 158 of the Code. The Code contains sufficient safeguards to ensure that the accused is not prejudiced by an amendment to the charge. Of significance is s 162 of the Code which reads as follows:

> Whenever a charge is altered or added by the Court after the commencement of the trial the prosecutor and the accused shall be allowed to recall or resummon and examine, with reference to such alteration or addition, any witness who may have been examined, and may also call any further evidence which may be material.

Pursuant to s 159 of the Code the court shall proceed with the trial only if the accused is ready to be tried on the amended charge, and, if not ready, only if the court is satisfied that proceeding immediately with the trial will not cause any prejudice to the accused. Section 160 of the Code provides that if proceeding immediately with the trial is likely to prejudice the accused the court may either direct a new trial or adjourn the trial for such period as may be necessary. On the other hand where the evidence adduced discloses a different basis for conviction on the original charge itself the prejudice that may be caused to the accused can be avoided by an intimation to the defence of the course to be adopted. The defence will, in that event, have the opportunity to reply to the proposed course to be followed and may, if it so desires, recall any witnesses for further cross-examination pursuant to s 138(4) of the Evidence Act 1950. This will remove any prejudice that may be caused to the accused by the course to be adopted. There will also be no prejudice to the accused if the case was conducted by the defence and or by the prosecution on the line of the new basis for conviction. In short the determinative factor is whether the defence has had the opportunity to meet the new basis for conviction. A similar test is also applicable when the prosecution leads evidence to which no reference has been made in the opening address. It follows that it cannot be automatically excluded as done in cases such as *Public Prosecutor v Kang Choo Heng & Anor* [1992] 3 CLJ 2574; [1991] 3 CLJ (Rep) 545 and *Pendakwa Raya v Norfaizal* [2003] 8 CLJ 581 without any consideration of the element of prejudice. Where the procedures just described have not been followed the burden will be on the defence to show the manner in which it has been prejudiced followed with a reply by the prosecution.

[170] Likewise here, in what way all the eight appellants were prejudiced have not been shown to us.

[171] It is certainly the duty of the appellate court to decide whether in a particular case any error, omission or irregularity is curable under s 422 of the Criminal Procedure Code. It is also the duty of the appellate court to consider whether all the eight appellants have had a full and fair trial along established and well-understood procedural lines in accord with the universal notions of natural justice. And, finally, the appellate court must also decide whether the misdirection in law has occasioned a failure of justice. See *Pendakwa Raya v Ishak bin Hj Shaari and other appeals* [2003] 4 MLJ 585; [2003] 5 AMR 401; [2003] 3 CLJ 843 (CA), with a coram of five judges.

[172] At the end of the day, it is the duty of the appellate court to decide whether there has been a failure of justice in consequence of a misdirection and, in so doing, the appellate court is entitled to take the whole case into consideration by weighing the evidence and then decide whether a guilty man has been acquitted or an innocent man has been convicted (*Lorensus Tukan v Public Prosecutor* [1988] 1 MLJ 251 (SC)).

[173] Both s 167 of the Evidence Act 1950 and s 422 of the Criminal Procedure Code are the relevant statutory provisions governing the consequence of improper admission or rejection of evidence.

[174] The curative powers of s 422 of the Criminal Procedure Code cannot be doubted. Some salient examples would suffice:

(a) that according to *Moh Yee Chong (f) & Anor v Public Prosecutor* [1955] MLJ 115, a defective charge amounts to an irregularity which could not possibly be said to have occasioned a failure of justice and is curable under s 422 of the Criminal Procedure Code;

(b) that according to *See Yew Poo v Public Prosecutor* [1949] MLJ 131; and *Lee Chin Kee v Public Prosecutor* [1935] MLJ 157, duplicity of charges are mere irregularities and they are considered curable under s 422 of the Criminal Procedure Code provided such duplicity has not occasioned a failure of justice;

(c) that errors and omissions in a charge are mere irregularities that are curable under s 422 of the Criminal Procedure Code, for examples:

(i) in *Wong Ah Kee v Public Prosecutor* [1949] MLJ 68, the word 'knowingly' was left out in the charge and it did not embarrass the accused in making his defence and was considered as an irregularity and curable as such; and

(ii) in *Public Prosecutor v Ginder Singh & Chet Singh* [1948] MLJ 194, the charge contained an omission of the place and the wrong weight

of the product and it was held to be an irregularity curable under s 422 of the Criminal Procedure Code.

(d) that according to *Ramalingam Pillay v The Crown* [1905] 9 SSLR 99 (HC), the failure to amend a charge is an irregularity which is curable since it has not occasioned a failure of justice;

(e) that according to *Wee Toon Boon v Public Prosecutor* [1976] 2 MLJ 191; [1975–1977] 1 SLR 498, the failure to state the particulars in the charge amounts to an irregularity which is curable; and

(f) that according to *Regina v Koomah* [1808–84] 3 Ky 67, a conviction under the wrong clause of an Ordinance is an irregularity which is curable.

[175] The crucial questions to pose would be these: Was the error in regard to the original charge in 'P2' an embarrassment to the defence? Has that error occasioned a serious miscarriage of justice which makes it incumbent on this court to reverse the findings of guilt and set aside the orders of detention made by the learned High Court judge against all the eight appellants herein? We would answer these questions in the negative. We hold that the original charge in 'P2' against all the eight appellants are validly preferred and that the appellants' defences indicated that they knew what they were charged for. We too hold that there was no serious miscarriage of justice to justify interference by this court.

[176] It is germane, at this juncture, to refer to s 60 of the Courts of Judicature Act 1964 which enacts as follows:

60 Powers of [Court of Appeal]

(1) At the hearing of an appeal the [Court of Appeal] shall hear the appellant or his advocate, if he appears, and, if it thinks fit, the respondent or his advocate, if he appears, and may hear the appellant or his advocate in reply, and the [Court of Appeal] may thereupon confirm, reverse or vary the decision of the [High Court], or may order a retrial or may remit the matter with the opinion of the [Court of Appeal] thereon to the trial court, or may make such other order in the matter as to it may seem just, and may by that order exercise any power which the trial court might have exercised:

Provided that the [Court of Appeal] may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

(2) At the hearing of an appeal the [Court of Appeal] may, if it thinks that a different sentence should have been passed, quash the sentence

A passed, [confirmed or varied by the High Court] and pass such other sentence warranted in law (whether more or less severe) in substitution therefor as it thinks ought to have been passed.

(3) The [Court of Appeal] shall in no case make any order under this B section as to payment of costs of any appeal to or by the appellant or respondent.

[177] That brings into sharp focus the meaning of the phrase 'failure of justice'. It is, according to KS Hedge J, in *CN Krishna Murthy v Abdul Subban C and another* [1965] 1 Cri LJ 565 at p 576, concerned with the need to have a fair trial and a just decision to be reached at the end of it. In the words of His Lordship:

D One of the contents of natural justice, which we so much value, is the guarantee of a fair trial to an accused person. A fair trial is as important as a just decision. Neither the one nor the other can be sacrified. Sacrifice of the one, in the generality of cases, is bound to lead to the sacrifice of the other. The two are closely interlinked.

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[178] We have read the appeal records and have had the advantage of listening to the oral submissions of the parties on both sides and we found that all the eight appellants were, in no way, denied of a fair trial. They valiantly put forth their defence, in the clearest way, and was not in any way prejudiced. It was quite obvious that at the trial, a well structured defence was F put up for the learned High Court judge to take into account which he did. In short, there was no miscarriage of justice in whatever manner or form that can be detected by this court.

G **[179]** We now turn to the allegation that the learned High Court judge failed to accept the defence of alibi. We must, at the outset, state that it has long been recognised that the prosecution may be unfairly disadvantaged if the defence is allowed to put forward a previously undisclosed alibi defence at the trial. Section 402A of the Criminal Procedure Code relates to the need H to give notice in writing of a defence of alibi to the public prosecutor at least ten days before the commencement of the trial. Such notice shall include certain required particulars. Section 402A of the Criminal Procedure Code enacts as follows:

I 402A Notice to be given of defence of alibi

(1) Where in any criminal trial the accused seeks to put forward a defence of alibi, evidence in support of it shall not be admitted unless the accused shall have given notice in writing of it to the public prosecutor at least ten days before the commencement of the trial.

(2) The notice required by sub-section (1) shall include particulars of the place where the accused claims to have been at the time of the commission of the offence with which he is charged, together with the names and addresses of any witnesses whom he intends to call for the purpose of establishing his alibi.

[180] The purpose of giving the required statutory notice is quite obvious. It is to enable the police to be given an adequate opportunity to investigate any alibi defence before hand and, at the same time, to interview any witnesses who are to testify in support of it. If the accused fails to give the requisite notice, he cannot give evidence in support of that alibi. This was exactly what had happened here.

[181] The late Harun Hashim SCJ writing for the Supreme Court in *Vasan Singh v Public Prosecutor* [1988] 3 MLJ 412 at p 414; [1989] 1 CLJ (Rep) 166 at pp 168–169, sets out the law on the defence of alibi succinctly in these erudite terms:

> Section 402A was added to the Criminal Procedure Code in 1976. Until then, accused persons were free to put up an alibi defence and to call witnesses in support of the alibi thus creating an element of surprise at the trial. The object of s 402A is aimed at this mischief. It seeks to deprive accused persons of the privilege of keeping back a defence of alibi until the last moment. Clearly the object is to prevent the accused person from keeping back not merely the names of any witnesses he might call in support of the alibi, but also the fact that an alibi is to be raised.
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> The question is, has the legislature achieved these objectives in s 402A. There is certainly now abundant authority that if witnesses are to be called in support of an alibi defence, then the requirements of a pre-trial notice must be complied with — strictly. What then is the position where the accused himself is the only witness to the alibi. It is obvious, however, that an alibi defence will not be a simple statement of: 'I did not do it. I was not there. I was elsewhere'. That would be evidence of a bare denial. To establish his alibi, the accused must disclose where he was at the time of the alleged offence and what he was doing. He could be travelling at the time and the only evidence he has is a ticket or an endorsement on his passport or, as here, he was in bed. That would be evidence in support of his alibi. The question is whether the words seeks to put forward in s 402A(1) include the case where the accused himself gives evidence. An accused who gives evidence himself clearly does so because he is seeking to put forward evidence tending to show that he was elsewhere at a particular time. And that evidence is the evidence in support referred to in the sub-section. We are therefore of the view that the words of s 402A(1) given their natural meaning include the case where the accused alone is to testify that he was elsewhere at the material time. Thus:
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> > Sub-section (1) standing by itself clearly means that notice must be given in all cases of an alibi defence otherwise the evidence will be excluded. No distinction is made between an alibi defence of the accused alone and an alibi defence supported by witnesses.

Sub-section (2) sets out the particulars required in such a notice which is in two parts:

(a) Particulars of the place where the accused claims to have been at the time of the commission of the offence with which he is charged; and

(b) The names and addresses of any witnesses whom he intends to call for the purpose of establishing his alibi. If the accused does not intend to call any witnesses, then he need only comply with part (a) of the notice.

The primary purpose of an alibi notice is to alert the prosecution to the fact that an alibi might be relied upon so that they may have the opportunity before the trial of making such investigations as they think fit. It may well be that the alibi is in fact true in which event the prosecution will either withdraw the charge or offer no evidence in the case.

The defence of alibi is a legitimate defence and in fact is often the only evidence of an innocent man. The difficulty, it seems to us, is when and how to exclude an alibi defence for non-compliance with s 402A. First, a distinction should be drawn between a bare denial and an alibi defence. Evidence of bare denial is in any case always admissible. In order to distinguish one from the other, the court must know the nature of the evidence. As was said in *Ku Lip See v Public Prosecutor* [1982] 1 MLJ 195 at p 196:

> If a trial court having considered the evidence put forward by the defence, holds that such evidence amounts to evidence in support of an alibi for which no notice under s 402A of the Criminal Procedure Code has been given, then he has no discretion in the matter but to exclude such evidence.

It follows that, initially, the court cannot prevent an accused person from giving evidence. Having heard the evidence, then the trial court must decide the nature of the evidence. If it is only evidence of a bare denial, the evidence stays. If it is evidence in support of an alibi and no notice under s 402A has been given, then he must exclude that part of the evidence from his consideration of the defence evidence.

[182] Here, since there was no notice given under s 402A of the Criminal Procedure Code the learned High Court judge was correct in excluding the evidence relating to alibi defence.

[183] Time and again, it has been stated that an appellate court should be slow in interfering with a finding of fact of the trial court which had observed the demeanour and heard the witnesses before coming to its conclusion. These appeals by the appellants were based entirely on the findings of facts made by the learned High Court judge. The learned High Court judge needs to assess, weigh and for good reasons either accept or reject the whole or any part of the evidence placed before him and we must hold that he has done all that admirably. The appellants' defences were mere denials and that did

not go down well with the learned High Court judge and we agree with him. Haziq (fifth appellant) certainly has the right to make an unsworn statement from the dock but he cannot be cross-examined. The learned High Court judge can attach such weight on the unsworn statement of Haziq (fifth appellant) as he thinks fit (*Public Prosecutor v Sanassi* [1970] 2 MLJ 198; *Chai Ko Chim v Regina* [1958] SCR 25; and *Mohamed Salleh v Public Prosecutor* [1969] 1 MLJ 104). We have considered the unsworn statement of Haziq (fifth appellant) from the dock and we too have anxiously considered the appellants' defences and we unanimously agree that the appellants' defences had failed to raise any reasonable doubt in the prosecution's case and that the prosecution had proved its case beyond reasonable doubt that all the appellants were guilty as per the charge. We must make it clear that we too concur with the findings of facts by the learned High Court judge.

[184] Ong Hock Thye FJ in *Herchun Singh & Ors v Public Prosecutor* [1969] 2 MLJ 209, at p 211, made the following observations on the role of an appellate court:

> This was a finding of fact that the report which was taken down contained errors and omissions for which the constable alone was responsible. This view of the trial judge as to the credibility of the witness must be given proper weight and consideration. An appellate court should be slow in disturbing such finding of fact arrived at by the judge, who had the advantage of seeing and hearing the witness, unless there are substantial and compelling reasons for disagreeing with the finding: see *Sheo Swarup v King-Emperor* AIR 1934 PC 227.

[185] Abdul Hamid Omar FCJ (later the Lord President of the Supreme Court of Malaysia) in *Lai Kim Hon & Ors v Public Prosecutor* [1981] 1 MLJ 84, aptly said at p 93:

> Viewed as a whole it seems clear that the finding of fact made by the trial judge turned solely on the credibility of the witnesses. The trial judge heard the testimony of each witness and had seen him. He also had the opportunity to observe the demeanour of the witnesses. Discrepancies will always be found in the evidence of a witness but what a judge has to determine is whether they are minor or material discrepancies. And which evidence is to be believed or disbelieved is again a matter to be determined by the trial judge based on the credibility of each witness. In the final analysis it is for the trial judge to determine which part of the evidence of a witness he is to accept and which to reject. Viewed in that light we did not consider it proper for this court to substitute its findings for that of the learned trial judge.
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> The principle of law governing appeals in criminal cases on questions of fact is well established, in that the Appeal Court will not interfere unless the balance of evidence is grossly against the conviction especially upon a finding of a specific fact involving the evaluation of the evidence of a witness founded on the credibility of such witness.

In the instant case the learned trial judge very carefully analysed all the available evidence before him and made specific findings of fact founded upon that which he believed to be the truth. He also drew certain inferences from facts specifically found. In this respect we may form our independent view but we should only do so where the fact upon which the inference was drawn was either unwarranted or manifestly against the weight of evidence.

[186] We now make reference to the ages of the appellants at the time of the offence. Haikal (first appellant) was born on 18 August 1986 and on the date of the offence he was 17 years 7 months 10 days old. Shafiq (second appellant) was born on 23 March 1987 and on the date of the offence he was 17 years 5 days old. Mohamad Afif (third appellant) was born on 3 March 1987 and on the date of the offence he was 17 years 25 days old. Firdaus (fourth appellant) was born on 9 May 1987 and on the date of the offence he was 16 years 10 months 19 days old. Haziq (fifth appellant) was born on 5 January 1987 and on the date of the offence he was 17 years 2 months 23 days old. Adam (sixth appellant) was born on 4 October 1987 and on the date of the offence he was 16 years 5 months 24 days old. Rasyidan (seventh appellant) was born on 5 February 1987 and on the date of the offence he was 17 years 1 month 23 days old. Finally, Farhan Faiz (eighth appellant) was born on 29 June 1987 and on the date of the offence he was 16 years 8 months 29 days old.

[187] Notwithstanding the ages of the appellants at the time of the offence, we dismiss their appeals and we hereby affirm the decision of the learned High Court judge. This means that the appellants will continue to be detained in a prison during the pleasure of His Royal Highness, the Yang DiPertuan Besar of Negeri Sembilan pursuant to s 97(2)(b) of the Child Act 2001.

[188] It is up to the Board of Visiting Justices of the prison where the appellants are held to review the appellants' cases individually at least once a year under s 97(4)(a) of the Child Act 2001 and may recommend to His Royal Highness, the Yang DiPertuan Besar of Negeri Sembilan on their early release or further detention pursuant to s 97(4)(a) of the Child Act 2001. And it has to be read with art 42 of the Federal Constitution. The prerogative of mercy can only be exercised by His Royal Highness, the Yang DiPertuan Besar of Negeri Sembilan and no one else.

Appeal dismissed and decision of trial court affirmed.

Reported by Ashgar Ali Ali Mohamed